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January 3, 1947.

SUBJECT: LEGALITY OF LICENSE TAXES IMPOSED BY THE CITY AND COUNTY ON OCCUPATIONS WHICH ARE SUBJECT TO STATE LICENSE TAXES.

Dear Sir:

You request a written opinion on behalf of Supervisor Mancuso as to

> "the legality of a proposal to impose license taxes on certain occupations which are already the subject of taxes levied by the State of California."

OPINION.

The case of West Coast Advertising Co. v. San Francisco, 14 Cal. 2d. 516, 524, 525, states as follows:

> "The levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair. . . . If the charter does not contain any limitation or restriction upon the power of the City of San Francisco to levy license taxes for revenue purposes, such taxes may legally be imposed and collected. An analysis of the pertinent charter provisions discloses that the framers thereof were careful to preserve rather than to prohibit the right to exercise the power here asserted by the city. There is no provision in the charter which denies the city's right to levy license taxes for revenue purposes on the business of the plaintiff herein."

With reference to Section 24 of the Charter of San Francisco the same case states as follows:

> "The concluding paragraph of the section singles out only sellers or manufacturers of goods, wares or merchandise operating at a fixed place of business upon whom license taxes may not be imposed except for 'health, sanitary or other ordinance enacted under the police power.' As to all other businesses, including that of the plaintiff herein, no restriction appears upon the right of the city to impose license taxes for revenue purposes."

Since the licensing of occupations for revenue is a municipal affair, the City and County of San Francisco has full power to license an occupation for revenue, even though already licensed, or

otherwise taxed by the State in the absence of a prohibition in its Charter or in the State Constitution.

In this regard reference is made to the following cases:

Application of Prentice 24 C. A. 345, in which a tax on plumbers under the freeholders' charter of the City of Stockton is upheld.

Ex parte Johnson, 47 C. A. 465, and Sonora v. Curtin, 137 Cal. 583, in which a license tax imposed by a city on a lawyer is upheld.

Ex parte Gelusha, 184 Cal. 697, and Redding v. Dozier, 56 C.A. 590, to the same effect as to a physician.

See also 37 C. J. 182, as follows:

> "... Where a municipal corporation is properly authorized either by its charter or by statute, it may tax an occupation or privilege which the state may tax, but has not taxed, or it may impose a further tax upon an occupation or privilege which is already taxed by the state, and it may impose occupation taxes on occupations which are licensed either by the city or by the state ... "

The law is well settled that taxation of an occupation by the State does not prevent the City and County from imposing a license tax upon it for revenue. If the license tax is intended for regulation, however, for a purpose which is a state affair rather than a municipal one, conflict with the state law on the subject must, of course, be avoided.

Respectfully submitted,

CITY ATTORNEY.

To: Mr. John R. McGrath,
Clerk, Board of Supervisors.

c.c. to Supervisor Edward T. Mancuso.

WP

January 10, 1947

UBJECT: VALIDITY OF SUBDIVISIONS (d), (e) AND (g), SECTION 354, HEALTH CODE, REGULATING PUBLIC LAUNDRIES.

entlemen:

You have requested an opinion as to the validity of subdivisions d), (e) and (g), Section 354, Part II, Chapter V (Health Code) of the unicipal Code of San Francisco.

Subdivision (d) prevents, with certain exceptions, operation or keeping pen of laundries and pick up and delivery of laundry on Sundays, eight ther specified holidays and between 7:00 P.M. and 7:00 A.M.

Subdivision (e) requires the name of the laundry to be painted in four nch letters on both sides of laundry pick up and delivery vehicles.

Subdivision (g) requires that there be, during all closed periods, n unobstructed view through laundry windows that open on public thoroughares.

O P I N I O N

Section 11, Article XI of the State Constitution authorizes the city nd county to make within its limits all such local, police, sanitary and ther regulations as are not in conflict with general laws. In the absence f conflicting state law, the police power of the city and county is, within its limits, as broad as that of the state itself. However, no such regulation of persons or property can be made arbitrarily. To be valid, the egulation must be reasonably necessary to protect the public health, dafety r welfare.

Certain cases decided by the courts indicate their probable conclusion n some phases of the question you present.

On the matter of restriction as to hours, the case of In re Mark, 6 al. (2d) 516, decided by the Supreme Court on June 18, 1936, held invalid provision of an Oakland ordinance regulating laundries. The provision s to days and hours of operation, pick up and delivery was practically dentical with the subject ordinance, except that the prohibition as to ours commenced at 6:00 P.M. instead of 7:00 P.M. The permitted opening ime in each case was 7:00 A.M. Petitioner was convicted of keeping open fter 6:00 P.M. and sought release on habeas corpus. In granting it, the ourt stated at page 521 as follows:

> "The fundamental law of the land has been held to be inconsistent with any restriction other than voluntary upon the particular hours of the day when a citizen may labor, when such restriction is in no sense otherwise related to an appropriate exercise of the police power.

(Citing Cases) It becomes apparent at once that, even if the restriction of the hours of labor as such were conceded, without more, to be within a legitimate exercise of the police power, nevertheless; before such a regulation may be deemed valid it must be so enacted as to operate uniformly. As noted by Mr. Justice Field in the earlier case of In re Quong Woo, (1882) 13 Fed. 229, ' . . . . the business of a laundry -- that is, the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used -- is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is.' Remarks were added to the effect that the municipality has the power to regulate the method of operation and conduct so as to guard against any menace to the public health or safety. This the city of Oakland has done by the enactment of the other provisions of the ordinance in question.

"Without extending further the discussion of an obvious matter it must be concluded that the reasons assigned in the decisions in the last cited cases answer in the negative all of the contentions made in support of the validity of the further provision relating solely to 'Hours,' and are pertinent and compelling in arriving at the conclusion that that section of the ordinance is an unreasonable restriction upon the rights of laundry owners, operators and employees in the city of Oakland, is in violation of article I, section 13, of the state Constitution and the Fourteenth Amendment to the federal Constitution, deprives the petitioner, of his liberty and property without due process of law and denies him the equal protection of the law."

In Yee Gee v. San Francisco, 235 Fed. 757, the United States District ourt, through Judge Van Fleet, enjoined the city and county from enforcing rovisions of a former ordinance prohibiting laundering operations from :00 P.M. to 7:00 A.M. The court stated in part at page 767 as follows:

"Obviously, in view of the other features of the ordinance quoted above, the only menace intended to be met by this particular regulation is danger from fires. But to say that to obviate that danger it is reasonably necessary that the hours of labor in such an industry be curtailed to the narrow limits prescribed, and the business necessarily closed down, and that throughout the entire territory within the corporate limits of a city as large as San Francisco, with its not infrequent districts of partially or wholly unoccupied blocks and lots, where the maintenance of a laundry could give rise to no conceivable danger to the public from such source, is, on the face of it, to state an absurdity. It would be quite as reasonable to enact that by reason of the same danger all factories and industries within the city limits employing fires in their operation should be subjected to the same res-

taurants, eating houses, and hotels, in the kitchens and dwellings of the artisan and the laborer and of the inhabitants generally, should be limited to the hours between 7 o'clock in the morning and 6 o'clock in the evening."

It does not appear that a 7:00 P.M. closing requirement rather than 6:00 P.M. would have caused these courts to hold valid the provisions there declared to be void. In the case of In re Wong Wing, 167 Cal. 109, the Supreme Court held valid a San Francisco ordinance prohibiting only the conduct of laundering operations from 6:00 P.M. to 7:00 A.M. The Marks case points out that the Oakland ordinance which the court declared void prohibit also during these hours the keeping open of the establishment as well as pick up and delivery. Judge Van Fleet criticises even this distinction. An ordinance which would prescribe closing hours in accordance with any reasonable requirements as to fire risks in different areas and which would apply reasonably and without distinction to all businesses having comparable fire risks would doubtless be held valid in both state and federal courts, According to the above cases, the hour provision of the subject ordinance would be held invalid in both State and Federal courts.

As to Sunday and holiday closing, there is no California case referring specifically to the laundry business. However the principles of the following cases should govern.

In Ex parte Boehme, 12 C. A. 2d 424, an Oakland barber convicted of operating more than six days per week contrary to ordinance was released on the ground that the ordinance was void.

The Court said in part:

"What are known as Sunday laws are upheld, against the objection that they obstruct the constitutional right to freely labor, upon the ground that one day of rest in seven is necessary for the good health of the community. That ground, however, is not available to the respondent in the present case, for we have in this state a general statute limiting the number of days per week that any employee may work, which reads: 'Every person employed in any occupation of labor shall be entitled to one day's rest therefrom in seven' (Stats. 1893, p. 54, Sec. 1), and the violation of the statute is made a misdemeanor. The petitioner here, however, is not charged with such a violation; and it is obvious that he could keep his establishment open every day of the year and still not require his employees (if any) to work more than six days a week, or even five. It seems apparent to us that the real object in view in enacting subdivision (j) of section 23 of the Barber Shop Law was not to prescribe one day of rest in seven for barbers, but plainly to restrict competition among the owners of the shops. Such an object is certainly not within the police power under our Constitution."

The Supreme Court stated in In re Scaranino, 7 Cal. 2d 309, 311 as ollows:

> "The measure cannot be upheld upon the theory upon which the Sunday laws have been upheld, to provide for 'a periodical cessation of labor tending to the preservation of health and the promotion of good morals', for the reason that this measure is not general in its operation applying equally to all in need of rest and recuperation, but extending only to barber shop owners and employees."

See also Deese v. Lodi, 21 C. A. 2d 631, which held void a rather eneral but discriminating Sunday closing law.

I do not believe the Sunday closing provision in the subject ordinance ould be held valid.

No court decisions have been found bearing directly on the validity f subdivisions (e) and (g) of the subject ordinance. There may be facts hich would make these regulations reasonable for the protection of the ublic, but, as I do not have knowledge of them, I cannot express an pinion at this time as to the validity of these provisions. Perhaps he provision as to view through windows may be supported as a fire re- ulation, but it would seem, if so, that it would rather be part of fire revention legislation of broader application. If either regulation is o be held valid, it must be on the ground that it has a reasonable rela- ion to the public safety, health or welfare and is not discriminatory.

Respectfully submitted,

CITY ATTORNEY

o: Public Buildings, Lands
and City Planning Committee,
Board of Supervisors
o: The Mayor

p

January 13, 1947

SUBJECT: MAILING OF CHECK OF ACCUMULATED CONTRIBUTIONS CONSIDERED AS PAYMENT UNDER RETIREMENT BOARD RESOLUTION.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"A question has arisen about the status, under the Retirement System, of the death of Matthew M. Murphy, employed under limited tenure as a kitchen helper at the Laguna Honda Home. The following statements are submitted in the case:

"1 - Mr. Murphy's employment by the City and County was terminated, effective May 20, 1946, notice being received by the Retirement System on May 24, 1946.

"2 - In the regular course, a warrant was drawn as of May 31, 1946, in refund of the accumulated contributions standing to the credit of Mr. Murphy. The warrant was mailed from this office on June 14, 1946.

"3 - On June 16, 1946, Mr. Murphy died, and his relatives report that the warrant was received on June 17, 1946.

"4 - Section 226, Article 3, Part I, of the Municipal Code, says that a person ceases to be a member of the Retirement System "should he be paid more than one-quarter (¼) of his accumulated normal contributions."

"5 - The following paragraph was included in a resolution adopted by the Retirement Board on May 12, 1922, and appearing on page 97 of the Board's Minutes, reference, of course, being to the retirement ordinance then in effect:

BE IT FURTHER RESOLVED, that the appearance of an employee's name on a roll for the withdrawal of conributions and the transmission of that roll to the Auditor, properly approved by the President and Secretary, with a warrant drawn in favor of that employee for the amount of the accumulated contributions standing to his credit and the mailing of a notice to the employee at the last address on file in the office of the Board that such warrant has been drawn and may be secured by him at the Auditor's office and that his membership in the Retirement System has been terminated, shall be deemed to constitute withdrawal of accumulated contributions under the meaning of Ordinance No. 5561 (new series) and shall, therefore, terminate membership of the employee in the San Francisco City Employees' Retirement System.

"6 - Section 261(b), Article 3, Part I, of the Municipal Code, provides that "upon the death before retirement***of a member while in the city service, or within four (4) months after the discontinuance of city service, or while physically or mentally incapacitated for performance of his duty, if such incapacity has been continuous from discontinuance of city service, the Retirement System shall be liable for a death benefit***and such death benefit shall consist of:

1 - His accumulated contributions, and in addition thereto

2 - An amount equal to the compensation earnable by him during the six)6) months immediately preceding his death***"

"The question at issue in this case is whether Matthew M. Murphy had been paid his accumulated contributions prior to death and therefore had ceased to be a member of the Retirement System. If the answer is in the negative, his beneficiary would qualify for the death benefit described in item 6 above. If, however, the answer is in the affirmative, only his accumulated contributions would be reundable, and the amount equal to compensation earnable during the six months immediately preceding death, would not be payable.

"Your opinion is requested in the matter. Your opinion furnished to this office under date of December 6, 1945, referred to a right of election given to retired persons, and considered the question as to when payment of a retirement allowance is made".

O P I N I O N

It would appear that the resolution adopted by the Retirement Board on May 12, 1922, and in effect ever since then, is controlling in this matter. Under this resolution, Mr. Murphy's membership in the Retirement System terminated when the warrant was drawn in his favor in refund of his accumulated contributions and mailed to him on June 14, 1946.

Here Mr. Murphy died on June 16, 1946.

The warrant having been mailed to him on June 14, 1946 under the provisions of the above referred to resolution of the Retirement Board, his membership of the Retirement Board then terminated and it is considered that he has been paid his accumulated contributions prior to his death on June 16, 1946.

Respectfully submitted,

To: Retirement Board

CITY ATTORNEY

NSW

January 13, 1947

SUBJECT: REGULAR DEATH BENEFITS PAYABLE WHERE MEMBER RETIRES AT AGE 70, UNDER COMPULSORY RETIREMENT, AND DIES WITHIN 30 DAYS OF COMPULSORY RETIREMENT WITHOUT HAVING MADE AN ELECTION.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"A question has risen about the payment of a death benefit in the case of Joseph J. O'Brien, who died on October 17, 1946. The facts of the case are as follows:

"1 - Joseph J. O'Brien was employed as a painter in the Building Repair Bureau of the Department of Public Works.

"2 - He was a member of the Retirement System and attained the age of seventy years on September 17, 1946, and was retired under the compulsory retirement provisions in section 165 (b) of the Charter, and section 251, Article 3, Part I, of the Municipal Code.

"3 - On July 31, 1946, at the request of Mr. O'Brien, quotations were furnished to him which outlined the optional modification of allowances, as set forth in section 257, article 3, part I, of the Municipal Code.

"4 - On September 6, 1946, Mr. O'Brien was advised of the effective date of compulsory retirement, as of October 1, 1946, and requested to appear at this office (room 215 City Hall) for the purpose of signing certain documents to meet the requirements of the Department upon retiring for service.

"5 - Mr. O'Brien did not comply with our request, and therefore did not elect an option, as outlined in section 257, article 3, Part I, of the Municipal Code.

"6 - The death of Mr. O'Brien made it impossible for us to provide payment of any retirement allowance because the first payment was not due until November 1, 1946.

"You are requested to advise this office whether or not the regular death benefits are payable in this case, bearing in mind the provisions of section 257, article 3, part I, of the municipal code which states as follows:

'Until the first payment on account of any retirement allowance is made, and subject to the condition that, if the said retired person shall die within thirty

days from the date upon which said election is made, then the said election is void and of no effect, and the death shall be considered as that of a member before retirement,***'

"It is specifically brought to your attention that no election of option was made in this case, and we are therefore in doubt as to whether or not this person died as a member of the Retirement System, or whether he died as a retired person. Should we, under the information, pay the regular death benefits, or should we pay the six months' salary, plus the member's contributions, in which case it would be considered that the deceased died as a member of the System."

O P I N I O N

Section 165(b) of the Charter provides in part as follows:

"No member of the retirement system shall be retired, except in case of disability incapacitating him for the performance of his duties, unless he shall have attained the age of sixty-two years and completed ten years of continuous service, but retirement shall be compulsory at the age of seventy years."

Section 251, Article 3, Part I of the San Francisco Municipal Code provides in part as follows:

"Retirement of a member for service shall be made by the Retirement Board as follows:

"(a) Each member, except persons who have become members under Section 169 of the Charter, who has attained the age of seventy (70) years at the time of his entrance into the Retirement System, shall be retired forthwith, and each member, except persons who are members under Section 169 of the Charter, in city-service, or within four (4) months after discontinuance of city-service, or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from discontinuance of city-service, who attains the age of seventy (70) years, shall be retired on the first day of the calendar month next succeeding that in which the said member shall have attained the age of seventy (70) years."

The essential facts, as above related, appear to be that:

1. Joseph J. O'Brien attained 70 years of age on September 17, 1946.

2. He was notified on September 6, 1946 that the effective date of his compulsory retirement was October 1, 1946, and, was requested therefore to call at the Retirement office to make an election of option under which the Retirement benefits should be paid to him.

3. He died on October 17, 1946 without having made an election.

4. The death of Mr. O'Brien made it impossible to provide payment of any retirement allowance because the first payment was not due until November 1, 1946.

The question involved is whether, under the circumstances above related, Mr. O'Brien died as a member of the Retirement System or whether he died as a retired person.

It is clear from the provisions of section 257, Article 3, Part I of the San Francisco Municipal Code that if a retired person dies within 30 days from the date upon which the election is made then the election is void and of no effect, and the death is considered as that of a member before retirement. Here Mr. O'Brien died within 17 days of the effective date of his compulsory retirement, but he had made no election theretofore. Does his failure to have made an election before death (even tho he died within 17 days of the effective date of his compulsory retirement) prevent his death being considered as that of a member before retirement? Under the facts of this case I believe not.

I am of the opinion that both a liberal and reasonable interpretation of Section 257, Article 3, Part I of the San Francisco Municipal Code must be given in this matter, and such an interpretation would call for the conclusion that in the absence of an election by Mr. O'Brien the effective date of his compulsory retirement would constitute his election date. Mr. O'Brien's death on October 17, 1946 being within 30 days of election date (as above calculated, and which therefore was on October 1, 1946) would call for his death being considered as that of a member before retirement and the payment of six months salary plus his contributions.

Respectfully submitted

CITY ATTORNEY

To: Retirement Board

NSW

3901

January 14, 1947.

SUBJECT: Destruction of Records

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"The office of the Purchaser of Supplies is desirous of destroying certain useless records which have accumulated over a period of years.

"There are provisions contained in the Political and Government Codes on the subject of the destruction of records and there is a further provision designated Section 328, Part I of the San Francisco Municipal Code.

"Will you be good enough to inform me which provision of the law is controlling and the proper procedure by which to accomplish the purpose referred to."

OPINION

Section 328 of Article 4, Part I of the San Francisco Municipal Code provides for the destruction of useless papers as follows:

"Destruction of Useless Papers. Any department head as defined in Section 20 of the Charter is authorized to destroy or otherwise dispose of useless papers of such department five (5) years after receipt thereof and after they have served their purpose and are no longer required. The Controller shall approve for such department the destruction or preservation of papers relating to financial matters. The City Attorney shall also instruct department heads on destruction of papers which may have legal significance. The Retirement Board shall supervise the destruction or preservation of payroll checks, time cards, etc., and on request, payrolls, time cards, etc., shall be delivered to said Retirement Board."

For the destruction of useless "municipal" papers, the provisions of the above section of the San Francisco Municipal

Code apply. The procedure to be followed is very clearly set forth therein.

The provisions of Section 1225 of the Government Code are as follows:

> "Destruction of City Records No Longer Required. Unless otherwise provided by law, the head of any city department, with the approval, by resolution, of the legislative body of such city and consent in writing of its city attorney, is authorized to destroy or otherwise to dispose of any record of such city under his charge after they have served their purpose and are no longer required.
>
> "Nothing in this section shall be deemed to authorize the destruction of any record affecting the title to real property or liens thereon, the records of any court, any record required to be kept by State statute or any record less than five years old or the minutes, ordinances or resolutions of the legislative body of the city or of any board or commission thereof."

The above quoted provision of the Government Code, in so far as San Francisco is presently concerned, only applies to state affairs being carried on by our local officials.

As a general guide to be followed, it might be said that any record that is kept pursuant to a state statute, or where a city department in accumulating records is acting in a state matter, such records may only be destroyed pursuant to the authority granted in the Government Code; whereas, if the record in question is made in the conduct of a purely municipal affair, its retention or destruction is governed by the provisions of our San Francisco Municipal Code.

You are thus advised in connection with your inquiry as presented.

Respectfully submitted,

Purchaser of Supplies CITY ATTORNEY

NSW

January 15, 1947

UBJECT: NO FEE MAY BE CHARGED FOR LICENSING NURSERIES.

ear Sir:

This will acknowledge receipt of your request for further enlightenent as to my opinion to you dated October 4, 1946. You state your reuest, in part, as follows:

> "Your opinion concludes, 'You are therefore advised that under Section 102 of the Agricultural Code, in any ordinance regulating nurseries no fee may be charged for any certification required for nurseries. This, of course, means that no license fee may be exacted in such case.'
>
> "This conclusion, because it uses the word 'certification' does not seem to me to quite answer my inquiry as to whether by ordinance nurseries in the city and county may be licensed and license fees prescribed that will be sufficient to cover the cost of a nursery inspection service.
>
> "Section 24 of the Charter authorizes the Board of Supervisors to regulate, by ordinance, 'the issuance and revocation of licenses and permits ... for the operation of businesses or privileges which affect the health, fire prevention, fire fighting, crime, policing, welfare or zoning conditions of or in the City and County, and for such other matters as the Board of Supervisors may deem advisable.'"
>
> " . . . Would not the Board of Supervisors therefore have authority to enact an ordinance requiring commercial nurseries in San Francisco to be inspected and licensed for the protection of home gardens and public parks in the City and County and to pay a license fee sufficient to cover the cost of such inspection?"

O P I N I O N

Section 30 of the Agricultural Code provides generally as to the uties of the Department of Agriculture, as follows:

> "Duties of department, generally. The department shall promote and protect the agricultural industry of the State; prevent fraud and deception in the packing or labeling or in any phase of the marketing of agricultural products governed by this code; prevent fraud and deception in the labeling and marketing of commodities, governed by this code, sold to producers for use in the production of crops in accordance with common practices; prevent the introduction and spread of injurious insect or animal pests, plant disease and noxious weeds ; execute the provisions of this code except as otherwise

provided; and may distribute such insects as are useful in reducing the cost of crop production."

Section 102 of the Agricultural Code provides in part as follows:

> "Each commissioner is an enforcing officer of all laws, rules and regulations relative to the preventing of the introduction into, or the spread within the State of pests, and as to such activities is under the supervision of the director."

It would thus appear that the Department of Agriculture has undertaken the regulatory inspection of nurseries within the State --the very type of regulatory inspection which you ask whether the Board of Supervisors can by ordinance also supervise and exact a license fee therefor.

Under the term of the prohibition contained in Section 102 of the Agricultural Code, as referred to in my opinion to you of October 4, 1946, I do not believe that the Board of Supervisors can by ordinance, in attempting to regulate nurseries, require the payment of a license fee for such inspection.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative officer
cc: The Mayor
NSW

January 15, 1947

SUBJECT: CLAIM FOR DAMAGES AGAINST THE CITY AND COUNTY OF SAN FRANCISCO, LIMITATION OF TIME AS EFFECTED BY THE SOLDIERS AND SAILORS RELIEF ACT OF 1940, AS AMENDED OCTOBER 7, 1942.

Dear Sir:

We have your request for opinion as follows:

"On December 31, 1946, our President of these United States officially declared the ending of the war, effective as of 12 o'clock noon of that day.

"So that we may be properly advised and guided accordingly, will you please render us an opinion relative to the status of the members of our Armed Forces, in re: Statutes of Limitations for filing of Claims, under Charter Section 87."

O P I N I O N

I refer to my opinion No. 3536 of December 13, 1943 wherein I held that Section 87 of the Charter comes directly within the scope of Section 205 of the Soldiers and Sailors Relief Act of 1940, as amended October 7, 1942 and that the period of military service of any individual should not be included in computing the 60 day period for filing of a claim against the City and County of San Francisco as mentioned in Section 87 of the Charter.

The period of time which the Soldiers and Sailors Relief Act will continue in force and effect is to be found in Title 50, United States Code Annotated, Appendix, Section 585, ***"This act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President, and 6 months thereafter".

The proclamation of the President of the United States, No. 2714 of the 31st day of December, 1946, declared that a state of war still exists but that hostilities of World War II should cease as of 12 o'clock noon of that date. As yet there has been no proclamation terminating World War II by a treaty of peace and until such is proclaimed I am still of the opinion that the period of military service of any individual shall not be included in computing the 60 day period mentioned in Section 87 of the Charter.

Respectfully submitted,

CITY ATTORNEY

To: General Claims Agent
Municipal Railway

JGMcB

cc: Controller

January 17, 1947

SUBJECT: CAN CHIEF ENGINEER BE DETAILED TO HAVE CHARGE OF THE BUREAU OF FIRE PREVENTION AND PUBLIC SAFETY?

Dear Sir:

This will acknowledge receipt of your request for an opinion on the following questions:

1) Is the Fire Prevention Bureau under the Chief or the Commission?

2) If under the Commission, may the latter make an order making it subject to the Chief?

O P I N I O N

Section 38 of the Charter provides in part as follows:

> "The bureau of fire prevention and public safety under the jurisdiction of the fire commission is hereby established. The commission shall detail to said bureau from the uniformed force of the department an officer to have charge of said bureau and such other personnel as it may deem necessary, who will be paid the salary or salaries for their respective ranks in the fire department . . . . . .
>
> "The fire commission, relative to permits subject to issuance or revocation by the chief engineer of the fire department, shall, by regulation, prescribe such duties of the bureau of fire prevention as it shall deem appropriate . . . . . .
>
> "An appeal and advisory board is hereby created, consisting of the chief engineer of the fire department, who shall be the chairman, the fire marshal, and the heads of the bureau of building inspection and the department of electricity, and a lay member to be appointed by the mayor for a four year term . . . . ."

Answering your first inquiry, I believe the above Charter provision learly places the Bureau of Fire Prevention and Public Safety under the urisdiction of the Fire Commission.

Answering your second inquiry, I believe that the Charter impliedly recludes the appointment of the chief engineer of the fire department as he officer to have charge of the Bureau of Fire Prevention and Public afety.

Obviously, the chief engineer of the fire department is the "top" man the department, next to the Fire Commission , and the operation and unctioning of the fire department is "in general terms" under his direction nd supervision. Here, we are concerned only with the question as to whether

the chief engineer of the fire department, in addition to his general direction of the fire department and his other important duties, can be detailed as the "officer to have charge" of the Bureau of Fire Prevention and Public Safety under the terms of Section 38 of the Charter.

It will be noted that Section 38 of the Charter provides in part as follows:

> "The fire commission, relative to permits subject to issuance or revocation by the chief engineer of the fire department, shall, by regulation, prescribe such duties of the bureau of fire prevention as it shall deem appropriate . . . ."

From the individual and separate references to the chief engineer and the bureau of fire prevention, as above quoted, it would appear that it was never contemplated that the "officer to have charge" of the Bureau of Fire Prevention would be the chief engineer.

The very next paragraph of Section 38 of the Charter creates an appeal and advisory board authorized to hear appeals from any "act, determination or order" of the Bureau of Fire Prevention and Public Safety. The principal member, and chairman thereof, is the chief engineer of the fire department. Certainly, the Charter never contemplated having the chief engineer acting as the "officer in charge" of the Bureau, and then also acting as a member and "chairman" of the appeal and advisory board to hear appeals emanating from this very same Bureau.

For these reasons I believe that the Charter impliedly precludes the detailing of the chief engineer of the fire department as the "officer to have charge" of the Bureau of Fire Prevention and Public Safety.

Respectfully submitted,

CITY ATTORNEY

To: Commissioner Sullivan
Fire Department
NSW

January 20, 1947

Subject: Sunday Passes on Municipal Railway.

Dear Sir:

You have asked the question, is it legal to issue Sunday Passes for use on the Municipal Railway?

OPINION

In connection with your above question, on June 6, 1946 the undersigned submitted an opinion to you in which it was held that old age pensioners were not entitled to reduced street railway fares. The theory of the opinion was that this class of persons was not granted reduced fares on the Municipal Railway prior to the 29th day of September, 1944 when the City acquired the operative properties of the Market Street Railway.

On November 7, 1946 an opinion was given you that veterans over eighteen years of age may not have issued to them school tickets for use on the railway. The latter opinion was based on a similar reason to that of the old age pensioners, and in both instances it was held that neither request could be granted until the balance of the debt due the Market Street Railway Company is paid.

Your present inquiry as to the legality of the issuance of Sunday Passes is governed by subdivision (d), Par. 5, of Section 119.1 of the charter:

> "That uniform rates, fares and charges, and universal transfer privileges shall be established and maintained by the commission and that except for school children and other special cases pursuant to which reduced or free transportation now exists in accordance with the existing practice of the municipal railway, the regular fare for transportation of passengers on said unified street railway system shall not be less than 7 cents per passenger until the purchase price of said operative properties shall have been paid in full as herein provided; and provided, however, that said fares shall not be increased in excess of 7 cents per passenger except in accordance with the procedure of section 130 of the charter;"

The subdivision above quoted was carried into the contract for the purchase of the operative properties entered into between the City and the Market Street Railway Company on September 14, 1944. The answer to your question is therefore a factual one:

If it was the practice of the Municipal Railway in September, 1944 to provide and sell Sunday Passes you are privileged to do so; if not, you may not do so as such passes obviously would provide rides at less than 7 cents per passenger. This you may not do, as it would violate the terms of Section 119.1 of the charter and the contract between the City and the Market Street Railway Company.

Yours truly,

JOHN J. O'TOOLE, City Attorney

By _____
DION R. HOLM
Public Utilities Counsel

To:
Manager of Utilities

DRH

January 21, 1947

SUBJECT: EFFECTIVE DATE OF GARBAGE COLLECTION ORDINANCE 4181.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"This office is receiving numerous inquiries as to the effective date of Bill 4259, Ordinance 4181 (Series of 1939), an initiative ordinance amending the initiative ordinance adopted by the electors on November 8, 1932, Regulating Refuse Collection and Disposal, which was approved by the electorate on November 5, 1946.

"This office will appreciate receiving from you an official expression as to the effective date of said amendment."

O P I N I O N

Section 174 of the Charter provides that the general laws of the State respecting initiative measures shall be applicable to the City and County except as otherwise provided in the Charter or by ordinance. The only section of the Charter regarding the effective date of ordinances is Section 16 which pertains only to ordinances passed by the Board of Supervisors.

Therefore, we must look to the Elections Code of the State of California. Section 1617 thereof provides that Initiative Ordinances shall be effective ten days after the vote is declared by the Board of Supervisors. Resolution 6056 (Series of 1939) approving the canvass of votes cast at the General Election held November 5, 1946, was approved on December 3, 1946.

It is therefore my opinion that the effective date of Bill 4259, Ordinance 4181 (Series of 1939) is December 14, 1946.

Respectfully submitted,

CITY ATTORNEY.

To: Board of Supervisors

CMA

January 21, 1947

SUBJECT: TREATMENT TO BE ACCORDED BY DEPARTMENT OF PUBLIC HEALTH
RE: CHRISTIAN SCIENTISTS

Dear Sir:

This will acknowledge receipt of your request for an opinion as follows:

"Two elderly women, Mrs. Marion Campbell and Mrs. Beatrice Vrooman, estimated to be about 60 years of age, both of 1930 Gough Street, were brought into Central Emergency Hospital from this neighborhood at 9:33 this morning as a result of a telephone call for an ambulance.

"In Mrs. Campbell's case there were multiple lacerations of the skull and the possibility of a fracture of the skull. In Mrs. Vrooman's case there were multiple lacerations of the scalp and a possible fracture of the left forearm. Both patients were conscious when seen by the physician in attendance.

"A Mr. B. V. Von Senden living in the vicinity came to Central Emergency Hospital and identified himself as a Christian Science Practitioner from the Christian Science Home at 2700-18th Avenue. Objections were made by Mr. Von Senden as to first aid measures to stop bleeding, the statement being that 'no poisons should be put on the wounds'. The wounds however were dressed with consent and the bleeding presumably controlled. The Christian Science practitioner desired to take over these cases, there being no relatives that we could locate at that moment. He stated that he wished to take them to the Christian Science Rest Home and that he had a right to treat them in accordance with their religious beliefs.

"This matter was further discussed with the police who held them pending investigation by the District Attorney's office. Because of the circumstances surrounding these cases, there being police and District Attorney's investigations, and because of the type of injuries, the Director of Public Health offered every facility of the San Francisco Hospital for their care. This was not only offered to everyone involved but also to Mr. James Vincent, the public relations representative of the Christian Science Church. Mr. Vincent called my attention to the fact that there should be no interference with the Christian Science practitioner in the performance of their calling. The patients were released to the Christian Science practitioner and to the Christian Science Rest Home, written release being obtained. The writer again told Mr. Vincent that he would be very glad to offer every facility of the San Francisco Hospital and the Department of Public Health for their treatment and hospitalization.

"Later, Mr. Harding McGuire of the District Attorney's office telephoned as to the possible responsibility of the city

accordingly. The patients, however, had been released and the matter was further discussed with Mr. Dion Holm of the City Attorneys Office.

"The point the writer is raising is:

"Is it possible that we can enforce the matter of treatment and care of patients of this religion and refuse to turn such cases over to a Christian Science practitioner?

"In other words, what are the rights of the Director of Public Health or the Department of Public Health under these circumstances (a) as to treatment and (b) as to hospitalization in our institutions without consent, accordingly.

"It is my further understanding that this matter was discussed by Mr. Harding McGuire of the District Attorney's office with Mr. James Vincent and with the attorney for the Christian Science Church.

"I further advised Mr. Vincent that because of the refusal of care in the San Francisco Hospital, x-rays, etc. and the visible type of injures, that some physician or surgeon be obtained to follow these cases through to some ultimate conclusion, and the available family members notified.

"Finally, we were pleased to be of additional assistance by transporting these patients by ambulance to the Christian Science Rest Home."

O P I N I O N

You ask what are the rights of the Director of Public Health or the Department of Public Health in connection with (a) the treatment of patients, and (b) the hospitalization of patients who come or are brought to the Department of Public Health for attention, and where a Christian Science practitioner voices objections to the treatment or care that is contemplated to be given the patient?

In answer to your inquiries I would advise you as follows:

Render such care and treatment as you believe reasonable medical judgment would direct unless you are directed otherwise by the patient himself, or by the mother or father of the patient if the patient be a child.

Respectfully submitted,

CITY ATTORNEY

To: Director of Public Health
NSW
cc: TABrooks

January 23, 1947

SUBJECT: SELF-INSURANCE BY CITY AND COUNTY AGAINST LIABILITY FOR NEGLIGENCE OR CARELESSNESS OF ITS HOSPITAL STAFF MEMBERS AND EMPLOYEES.

Dear Sir:

You have requested an opinion as to whether the City and County can legally act as an insurer as to liability for negligence or carelessness of physicians, surgeons, dentists, interns and other persons rendering such service in the conduct of the City and County hospitals.

O P I N I O N

Section 1956 of the Government Code of California provides as follows:

> "INSURANCE OF OFFICERS AGAINST LIABILITY: CHARGING PREMIUM. The State, school districts, counties, and municipalities may insure their officers, including officers as defined in Article 2, against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries or damages resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property, including public property as defined in Article 2, and due to their alleged negligence or carelessness, either by self-insurance or in any insurer authorized to transact such insurance in the State. The premium for the insurance is a proper charge against the Treasury of the State, school district, county of municipality."

You will note that this section is a codification in an amended form of a portion of the claims statute of 1931.

As amended, it includes general negligence, as well as negligence in respect to a dangerous or defective condition of public property. It expressly includes also self-insurance. The word "officers", as used in this section, includes

> "any deputy, assistant, agent or employee of the State, a school district, county or municipality acting within the scope of his office, agency or employment." (Sec. 1980 (c) Government Code).

The exclusion contained in Division 4 of the Labor Code refers only to liabilities arising under the Workmen's Compensation Act.

Under Section 1956, the City and County is authorized to act as insurer for the purpose stated in your inquiry. I understand that the State Director of Finance commenced a survey in 1944 to ascertain whether self-insurance was preferable for purposes which may be of interest in your problem from an administrative standpoint.

Respectfully submitted,

CITY ATTORNEY.

To: Chief Administrative Officer

cc: Board of Supervisors, Public Health and Welfare Committee.

WF

3/10

January 23, 1947

SUBJECT: RE CLEARING TITLE TO HUNTINGTON SQUARE WHICH WOULD PERMIT THE CONSTRUCTION OF AN UNDERGROUND GARAGE.

Gentlemen:

This office is in receipt of your request for an opinion which reads as follows:

> "At a recent meeting of the Committee on Public Buildings, Lands and City Planning, it was disclosed by Mr. Jerry Linares, Executive Secretary of the Park Commission, that opinion was received from your office to the effect that the title to Huntington Square could not be cleared to enable the city to permit the construction of an underground garage on that location, either by the city or by private capital.
>
> "The Committee is desirous of ascertaining whether action can be taken either by the city, state or federal government that would clear the title and permit the construction of the underground garage.
>
> "The Committee would be pleased to have your reply at your convenience."

O P I N I O N

This office rendered an opinion under date of December 2, 1946 numbered 3883 to the effect that Mrs. Arabella D. Huntington placed certain restrictions in the provisions of the grant to the City and County of San Francisco of the property known as Huntington Square. These restrictions prohibit the subsurface area of Huntington Park from being used for the construction and operation of a garage. As the opinion pointed out, the City and County of San Francisco is subject to any restriction which Mrs. Huntington incorporated in her grant. Should the City and County fail to comply with the reservations placed in the grant Mrs. Huntington expressly provided the property would revert to the "grantor, her heirs, executors, administrators or assigns".

You are therefore advised that the City and County of San Francisco is subject to the express terms of the grant and there is no action which could be taken by the city, state or federal government which would permit the construction of an underground garage and thus obviate the reservations placed in the grant by Mrs. Huntington.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
cc:TABrooks
RJB

January 27, 1947

SUBJECT: 1. EFFECTIVE DATE OF AMENDED SECTION 36 OF CHARTER

2. USE OF EMERGENCY ORDINANCE AND EMERGENCY RESERVE FUND FOR CREATION OF POSITIONS IN FIRE DEPARTMENT.

Dear Sir:

You have requested an opinion as follows:

O P I N I O N

Question: What is the effective date of Section 36 of the Charter as last amended so far as the shorter hours are concerned?

Answer: The effective date of the amendment for all purposes except salary increases is the date of the filing in the office of the Secretary of State of the concurrent resolution of the Legislature approving Charter Amendment No. 4. (Gov. Code Sec. 9602.) This date is January 7, 1947. Operation for all such purposes should conform to the terms of the law as amended from the beginning of the following day.

Question: If the effective date is prior to the close of the current fiscal year, can the additional positions be created by using money from the Emergency Reserve Fund and by emergency ordinance? (Additional positions in the following clases are to be created: Asst. Chief of Department; Battalion Chief; Captain; Lieutenant; Fireman; Lieutenant, Salvage Corps; Fireman, Salvage Corps; Pilot of Fire Boats; Marine Engineer; Marine Fireman and Chief Operator.)

Answer: Appropriations may be made from the emergency reserve fund for additional positions which may be necessary for the uniterrupted operation of the Fire Department in conformity with the law as amended. The department should not violate the provisions that no officer or member shall be required to work more than 130 hours in and 15 day period nor should it interrupt its operations even partially to an extent prohibiting operations reasonably necessary for the continuation of efficient departmental service which concerns protection of the lives and property of the city. It is proper to appropriate from the emergency reserve fund to avoid these contingencies.

There is a question of public officers involved, however, in the use of an emergency ordinance for this purpose.

Section 1 of Article IV of the State Constitution prohibits the use of urgency measures for the "creating or abolishing any office or changing the salary, terms or duties of any officer." This provision

has been held to apply to a police captain to prohibit the creation of such an office by an emergency appropriation ordinance of the city and county. Brown v. Boyd, 33 C. A. 2d 416. The question arises as to whether this prohibition applies in the present instance.

If the question presented is merely one of withdrawal of funds for the purpose from the emergency reserve fund, since an emergency does exist, the funds may be so appropriated in accordance with Section 79 of the Charter.

If the question presented is also one of the method of passage as an urgency measure, then it is necessary to determine whether any of the positions to be created are public offices.

It has been held that a fireman is not a public officer. This is placed on the ground that he does not exercise a portion of the sovereign power.

> "It clearly appears, as we think, that the firemen, other than the chief, employed by the council under the ordinance of June 23, 1897, are not public officers. They have no control of the fire department, nor of any of its property, for any purpose, other than to use it in the extinguishment of fires whenever the occasion requires. They are subject on all occasions, and in whatever they do in the course of their employment, to the direction and control of the chief of the department.***Hence they are simply persons in the employment of the fire department, and are not public officers of any kind."

State ex rel. v. Jennings (Ohio) 49 N. E. 404

The conclusion here is borne out by Sections 660 and 662 of the San Francisco Fire Code requiring members of the Fire Department detailed to theatres to notify police officers of violations of law observed by them rather than to act as peace officers themselves.

I note that offices of Assistant Chief of Department, Battalion Chief, Captain and Lieutenant are to be created in the Fire Department. If these officers exercise substantially a portion of the sovereign power they are to be regarded as public officers; otherwise as departmental officers only.

In this regard, the exercise of police pow er provided in Section 36 of the Charter would seem to be in point. It is as follows:

> "The chief of department, or in his absence any assistant chief of department, or in their absence any

battalion chief in charge, may, during a conflagration, cause to be cut down or otherwise remove any buildings or structures for the purpose of checking the progress of such conflagration."

It will be observed that this is an emergency power to be exercised only in the event of conflagration. Hence it can hardly be taken as a norm to determine what a judicial conclusion would be as to whether departmental officers of the Fire Department are public officers. It would seem conservative, however, to pass the appropriation ordinance with two readings and in regular form not only to create the position of Assistant Chief of Department, but also the position of Battalion Chief. In other cases, the ordinance may be passed as an emergency measure, if necessary to accomplish the required purpose.

Respectfully submitted,

CITY ATTORNEY

To: Controller

WP

3917

January 28, 1947

SUBJECT: PLANNING COMMISSION ACTION APPROVED BY "RESOLUTION" OF BOARD OF SUPERVISORS.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

> "For the edification of the Committee on Public Buildings, Lands and City Planning, I would appreciate an opinion from you with respect to the provisions of Section 117 of the Charter relating to set-back lines.
>
> "Query: When the City Planning Commission on its own motion recommends the establishment of set-back lines and so transmits its desires to the Board of Supervisors in the form of a resolution, is it incumbent upon the Board of Supervisors to adopt said recommendations of the City Planning Commission through the medium of a resolution by the Board or is an ordinance required to effectuate such concurrence?
>
> "Your reply is respectfully awaited."

O P I N I O N

That portion of Section 117 of the Charter here involved is as follows:

> " . . . that the supervisors, by not less than two thirds vote, may disapprove the action of the commission, provided, however, that any change in zoning, classification or building set-back lines made by the commission on its own motion shall require approval of the supervisors by a two thirds vote; . . . ."

You are advised, in answer to your inquiry, that the board of supervisors would indicate its approval of the action of the City Planning Commission by the passage of a "resolution" to this effect.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
cc: The Mayor
NSW

2/12

January 28, 1947

SUBJECT: NIGHT SHIFT WORK OF AUTO MACHINISTS WITH REGARD TO RATE OF PAY.

Gentlemen:

I am in receipt of your request for an opinion as follows:

"Under date of August 22, 1946, you advised us in reference to the interpretation of the meaning of the phrase 'rate of pay' as used in section 151.3. The question there was whether the provisions of the Auto Mechanics' contract, which provides for eight paid holidays, should be accepted as a basis for calculating the pay of these employees in the city and county service. You ruled that the commission need not take into account this provision of the contract as it dealt with working conditions rather than rate of pay.

"A question has now arisen regarding this same contract which provides for a premium pay over and above basic rate of pay for night shift work. We believe that you have in your files a copy of this contract and we will appreciate receiving from you your opinion as to whether under section 151.3 of the charter the city must pay the same differential as provided in this contract to municipal employees engaged on night shifts.

"Will you kindly forward a copy of your opinion to the Board of Supervisors for their information, as the matter of fixing wage scales for certain crafts, including Auto Machinist, is now before the Board of Supervisors pursuant to the provisions of section 151.3 of the charter as now amended."

O P I N I O N

The first paragraph of Section 151.3 of the Charter reads as follows:

"Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service. The rate of pay so fixed by the board of supervisors shall be determined on the basis of rates of pay certified by the civil service commission on or prior to April 1st of each year and shall be effective July 1st following: provided, that the civil

"service commission shall review all such agreements as of July 1st of each year and certify to the board of supervisors on or before the second Monday of July any modifications in rates of pay established thereunder for such crafts or groups as herein provided. The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly and the said revised rates of pay so fixed shall be effective from July 1st of the fiscal year in which the said revisions are determined."

It should be noted from the foregoing paragraph of Section 151.3 that the first part of this paragraph deals with one single rate of pay. There is no reference to more than one rate of pay until towards the end of the paragraph where the plural has been definitely used to supplant the singular. From a reading of this paragraph of Section 151.3, one must come to the conclusion that the Charter framers had in mind a single rate of pay for each group or craft; in other words, the Charter framers undoubtedly had in mind a basic rate of pay. This definition of rate of pay is entirely consistent with the fact that if the first paragraph of Section 151.3 concerned more than one rate of pay of a group or craft, there would be the utmost confusion and chaos in the City and County financial structure because of the many groups and crafts with which the City and County is concerned. There is no doubt but that at the time when this part of Section 151.3 was passed by the Board of Supervisors, the Board had in mind that there was a distinction between a basic rate of pay and premium pay and undoubtedly the voters concurred in the view of the Board of Supervisors. Had there been any intention to make the rate of pay go beyond a basic rate, this would have been stated in the provision and, in this connection, it must be noted that, while the City and County of San Francisco accepts the rate of pay of a group or craft, it definitely does not accept the collective bargaining agreement, as a whole, of any group or craft. The section involved here is restricted entirely to a single rate of pay. Viewed in this light, there is no ambiguity in the section and therefore there is no need to invoke any rules of statutory construction.

In view of the foregoing, I am of the opinion that the City and County is not required by Section 151.3 to pay a percentage over and above the basic rate of pay fixed in the Automotive Machinists' Contract when the employee does night shift work since adding a percentage to the basic rate when night shift work is done would have the effect of establishing an additional rate of pay over, above and beyond the basic rate.

I have carefully read the collective bargaining agreement of the automotive machinists and, while the language of this agreement has no bearing upon this opinion, I desire to call attention to the fact that in paragraph Second of the agreement, reference is made to the basic rate of pay and that in the subsequent paragraphs of the agreement, reference is made to additional percentages over and above the

basic rate covering different conditions, which indicates that the makers of the agreement had in mind the distinction between the basic rate of pay and premium pay.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission

cc: Board of Supervisors

WAD

3/15

January 28, 1947

SUBJECT: PARITY PAY IN CONNECTION WITH EMPLOYEES OF MARKET STREET RAILWAY COMPANY WHO HAD NOT COMPLETED ONE YEAR OF SERVICE PRIOR TO EMPLOYMENT AS LIMITED TENURE EMPLOYEES BY CITY.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"The Municipal Railway is now preparing supplemental time rolls which are intended to adjust to parity the pay of a number of former employees of the Market Street Railway Company who, on September 29, 1944, had had less than one year of service with said Company but were continued in the service of the Municipal Railway after consolidation, either under emergency or limited tenure appointment. We have been assured that any Market Street Railway Company service as was had by the employees herein under discussion was in the same position in which the respective employees were engaged in the service of the City after consolidation; and, that there was no interruption in the services of the employees aforesaid when the City acquired control of the Market Street Railway Company properties.

"In connection with the foregoing, your attention is directed to the provisions of the Salary Standardization Ordinance and the Annual Salary Ordinances.

"For your information there is attached hereto a copy of a letter dated October 10, 1946, addressed by the Civil Service Commission to the Manager of Utilities, which suggests the preparation of supplemental time rolls as first hereinabove mentioned.

"Will you please furnish us with an Opinion as to whether or not the Controller may legally issue his warrants in payment of the proposed adjustments of pay, which adjustments, for the purpose of determining the salary or wage to which the aforesaid former employees of the Market Street Railway Company are entitled, give credit and consideration to continuous service with said Company immediately prior to September 29, 1944, in the same manner as service with the City and County of San Francisco."

O P I N I O N

Section 6 of the Mayor's Proclamation of August 21, 1944, reads as follows:

"6. That for the purpose of obtaining the necessary employees to operate the combined properties of the Municipal Railway and the Market Street Railway Company and to thereby meet the existing emergency, all employees of said Market Street Railway Company engaged in the operating of street cars, buses or

trolley coaches, or engaged in the repair, conditioning or cleaning, servicing or maintaining of street cars, buses or trolley coaches, or operating, servicing or maintaining the necessary equipment and facilities for the operation, repair, conditioning or cleaning, servicing or maintaining street cars, buses or trolley coaches and other operative equipment and facilities, including tracks, wires, conduits and all appurtenances of said Market Street Railway Company shall be paid the same compensation as is now paid to employees of the Municipal Railway for like service, and that the seniority of said employees with the Market Street Railway Company shall be the basis for their compensation and seniority with the City and County in so far as runs and compensation are concerned, that is to say that service with the Market Street Railway Company shall be deemed service with the City and County in determining runs and compensation under the compensations fixed for like service with the City and County."

An examination of this paragraph discloses that it was intended to give former employees of the Market Street Railway Company, who had not completed a year of service with the Market Street Railway Company before entering the service of the City and County, the same rate of pay as given to the former Market Street Railway Company employees who were blanketed into the City and County service.

In view of paragraph 6, it is my opinion that the Controller may legally issue his warrants in payment of the proposed adjustments of pay mentioned in your request.

Respectfully submitted,

CITY ATTORNEY

To: Controller

WAD

January 29, 1947

Subject: Certification by Civil Service Commission of Groups or Crafts under Section 151.3 must be accepted by Supervisors.

Gentlemen:

You have asked if the Board of Supervisors may fix higher rates of pay than those found to be prevailing by the Civil Service Commission for the hereinafter mentioned city employees, in view of the recently enacted amended section 151.3 of the charter.

The employees affected are:

Classification	Present Pay	Rate Certified by Commission	Rate Requested by Union
M53 Auto Mechanic	$12	$13	$13.50
M54 Auto Machinist	13	14	14.50
M55 Foreman Auto Machinist	14	15.40	16.85
M60 Auto Fender and Body Worker	13	14	14.50
J156 Switch Repairman	9	-	10.50
J160 Track Welder	9	-	10.50

OPINION

The Civil Service Commission advised that there are existing bargaining agreements with employers employing the crafts M53, M54, M55 and M60 that apply to firms operating their own repair shops in which the firms' equipment is repaired and they pay the wages stated by the union. This group comprises some 750-1000 employees, whereas there is another bargaining agreement with employees under which some 3000 are engaged and pay under these agreements at the rates certified by the Civil Service Commission.

The Civil Service Commission certifies there are no bargaining agreements between the classifications J156 and J160 and that it knows of no rates of pay in private employment. The commission also points out that it recognizes that an inequity arises in view of the rates certified by the commission for the classification J152, which includes Trackmen. This inequity

the commission states will be corrected in the new Salary Standardization schedules that will be effective this coming July.

There are many other crafts I am advised that will likewise be inequitably dealt with until the positions are standardized and their pay set out as of July 1, 1947.

Section 151.3 of the charter as amended at the last election provides in part:

> "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service.
>
> * * *
>
> "Within thirty days after the ratification of this amendment, the Board of Supervisors shall fix wage schedules for the fiscal year 1946-1947 for the crafts and groups subject to the provisions of this section and which wage schedules shall be effective commencing July 1, 1946."

The last quoted paragraph makes it incumbent upon the Board of Supervisors to fix wage schedules retroactive to July 1, 1946 for the crafts and groups subject to the section partially quoted. This is to be done in accordance with collective bargaining agreements with employers in San Francisco, "and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, * * *."

The important part of the quoted language is that the Civil Service Commission shall first certify that the agreements exist and the wages set forth are generally prevailing and paid by the employers in San Francisco.

It is quite true from the facts submitted that a large

group of employees in the M classification enjoy the rates specified by the union but it is to be noted that this group is in the minority, consisting of 1000, and 3000 are paid 50 cents a day less. It appears that the Civil Service Commission considered the lesser sum as "generally prevailing" for this particular group in private employment. Had the commission certified the wages paid the minority group as the prevailing wage you would have been bound by this certification.

In view of the certification made by the Civil Service Commission, it is my opinion that under section 151.3 of the charter you are without power to change the certification and increase the wages as you indicated.

What has been said is not to be construed too literally, for if it were established that the Civil Service Commission failed to consider the bargaining agreements described in section 151.3, or if it were established that the commission acted arbitrarily or capriciously, and by this I mean if it were to set a salary for auto mechanics at a rate of $5 per day and it were commonly known that this was palpably erroneous, you would not be bound by the certification of the Civil Service Commission. But as it has the power under the section referred to to determine the terms of collective bargaining agreements, and so long as it reasonably performs this function and certifies what is the generally prevailing wage paid in San Francisco in private employment to groups or crafts, you are bound to follow its certification.

It is pointed out to you that your duties under section 151.3 are far more circumscribed than the authority granted you in section 151 of the charter, as in the latter section it is provided "the board of supervisors may approve, amend or reject the schedule of compensations proposed by the civil service commission;". No such latitude is granted under section 151.3, and in point of fact the section states "notwithstanding any of the provisions of section 151 or any other provisions of this charter * * *." the procedure determining the rate of pay shall be as outlined in this opinion.

In conclusion you are advised that you are bound by the certification made by the Civil Service Commission.

Respectfully submitted,

JOHN J. O'TOOLE
City Attorney

To

Finance Committee of the
Board of Supervisors

DRH

February 4, 1947

SUBJECT: NO MORE THAN 36 YEARS OF SERVICE MAY BE TAKEN INTO ACCOUNT UNDER SUBDIVISION (B) OF SECTION 165.2 OF THE CHARTER.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"As you know, proposed section 165.2, changing the retirement status of miscellaneous officers and employees of the City and County, was approved by the electorate on November 5, 1946. It does not become a part of the Charter until the legislature ratifies it, which probably will be in January, 1947, and the provisions of the section do not become effective until July 1, 1947.

"At the present time, however, we are being asked to quote the approximate benefits which individuals will receive under the proposed section. We feel that quotations cannot be made with confidence until certain provisions of the section are interpreted, hence the following statements are submitted to you:

" 1 - The next to the last sentence in subdivision (H)(1) reads:

"'Provided further that the member's contribution under this section and the city's contribution on his account shall cease after thirty-six years of credited service.'

" 2 - The first sentence in subdivision (H) opens with the sentence reading:

"'All payments provided under this section shall be made from funds derived from the following sources, plus interest earned on said funds:'

and then follows the paragraphs which set out the different sources of funds, including paragraph (1) from which the sentence in item 1 above, was quoted.

" 3 - The third sentence in subdivision (B) reads:

"'A member retired after reaching the age of sixty years shall receive a service retirement allowance at the rate of 1-2/3 per cent of said average final compensation, for each year of service'.

"In this provision there is no limit on the number of years of service to be included in the calculation of the benefit, in spite of the fact that the quoted sentence from subdivision (H)(1) limits contributions from both the city and the member,

to thirty-six years of service.

" 4 - Subdivision (H) which sets forth the sources of funds to support the benefits under the proposed section, does not contain any other source from which the benefits can be paid, although paragraph 5 of that subdivision requires of the city such amounts as may be necessary when added to the contributions referred to in the other paragraphs, to provide the benefits under the section. Apparently, the limitation in the quoted sentence from paragraph (1), under which the member's contributions and the city's contributions on his account would be terminated, applies to the contributions required under paragraph 5.

"You are requested to advise the Retirement Board as to whether more than thirty-six years of service are to be taken into account under subdivision (B) of section 165.2, in determining the benefit of a member retiring for service."

O P I N I O N

Subdivision (B) of section 165.2 of the charter provides in part as follows:

> "A member retired after reaching the age of sixty years shall receive a service retirement allowance at the rate of 1-2/3 per cent of said average final compensation, for each year of service."

Subsections (1) and (5) of subdivision (H) of section 165.2 of the charter provides in part as follows:

> "(H) All payments under this section shall be made from funds derived from the following sources, plus interest earned on said funds:
>
> "(1) . . . . . Provided further that the member's contribution under this section and the city's contribution on his account shall cease after thirty-six years of credited service. . . . .
>
> "(5) The city and county shall contribute to the retirement system such amounts as may be necessary, when added to the contribution referred to in the preceding paragraphs of this subsection (H), to provide the benefits payable under this section."

You ask whether more than thirty-six years of service are to be taken into account under subdivision (B) of section 165.2 of the charter in determining the benefits of a member retiring for service?

All of the subdivisions of section 165.2 of the charter must be read together in order to arrive at the proper interpretation to be given to

this charter provision. Any such analysis makes it clear that this charter provision not only intended to specify the retirement benefits to be accorde to the miscellaneous officers and employees of the city, but also to provide how the funds were to be collected to pay for these benefits and how payments were to be made.

Payments, it is stated, were to be made from the funds derived from the sources related. Provision is then made for the contributions to be made by the member of the system here concerned and by the city. It is distinctly stated that "the member's contribution under this section and the city's contribution on this account shall cease after thirty-six years of credited service."

In view of the fact that payments were to be made only out of the funds derived from the sources listed, and all payments from these sources would cease after thirty-six years of credited service, it must follow that no more than thirty-six years of service may be taken into account under subdivision (B) of section 165.2 of the charter in determining the benefits of a member retiring for service. Any other interpretations would result in certain members receiving benefits for which neither they, nor the city, had been called upon to make contributions, and would further do violence to the very specific requirement of subsection (H) that "all payments provided under this section shall be made from funds derived from the following sources, plus interest on said funds."

You are therefore advised that no more than thirty-six years of service may be taken into account under subdivision (B) of section 165.2 of the charter in determining the benefits of a member retiring for service.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board
NSW

February 13, 1947

SUBJECT: LAMINATED SAFETY GLASS FOR STREET CARS IN INTERURBAN SERVICE.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"I am advised that Section 6954, Chapter 3, Part 2 of the Safety Section of the Labor Code provides as follows:

> "On and after September 1, 1946, all street cars and interurban service must be equipped with laminated safety glass."

"Will you please advise whether or not our operations into San Mateo County come under the provisions of this law."

O P I N I O N

By the General Laws of 1941, Chapter 292, subparagraph 1, page 1435, various safety devices were made mandatory with respect to the operation of interurban electric car service. This statute has been incorporated with particular pertinence to your inquiry in Sections 6953, 6954 and 6956 of the Labor Code. Section 6954 reads:

> "On and after the first day of September, 1946, it shall be unlawful to operate any electric car in interurban service or any electric locomotive which is not so equipped with laminated safety glass."

Section 6953 states the manner in which electric cars shall be equipped and reads:

> "Any electric car operated in interurban service and any electric locomotive shall be equipped exclusively with laminated safety glass in the compartment of the motorman or engineer, or if there is no compartment, the window in front of the motorman shall be so equipped, *."

Section 6956 states the penalty for violation of this statute and reads:

> "Any common carrier violating Sections 6953 and 6954 is guilty of a misdemeanor for each violation,

punishable by a fine of not less than one hundred dollars ($100) for each offense. Each day that any electric car is operated in interurban service or that any electric locomotive is operated, is a separate offense."

I wish to advise you that in interpreting this statute the operation of any street car in interurban service, after 1 September, 1946, not equipped with laminated safety glass in the manner prescribed, is unlawful and in violation of the statute.

Respectfully submitted,

JOHN J. O'TOOLE,
CITY ATTORNEY.

By_____
DION R. HOLM
Public Utilities Counsel

To: Manager of Utilities

JOMoB

3919

February 19, 1947.

SUBJECT: Publication of Emergency Ordinances.

Gentlemen:

I have your letter under date of February 7, 1947, reading as follows:

REQUEST

"Will you please give me your information and advice in the following matters:

1. For many years the practice in this office has been to proof-read those matters required by Charter to be published, after such publications have been made in the office newspaper. On those occasions when error has been found in the matter published, a republication has been had, the cost of which has been borne either by the City or the official newspaper, depending upon which of the two were responsible for the error. Will you please give me your opinion as to the legality and advisability of the practice referred to. (In Los Angeles, proof-reading is done before publication)

2. In this same connection, Section 13 of the Charter provides: 'Emergency ordinances shall be published immediately on passage.' Assuming that your advice should be to the effect that proof-reading should be accomplished before publication, how would that practice be affected by the quoted charter provision and what is meant by the term 'immediately'?

2. There is presently pending before the Judiciary Committee of the Board of Supervisors a Bill entitled: 'Regulating the construction, erection, enlargement, raising, alteration, repair, removal, maintenance, use and height of buildings, regulating character and use of materials in and for buildings; establishing fire limits, and repealing all ordinances and sections of the San Francisco Municipal Code in conflict with this ordinance.

This is the proposed new Building Ordinance or

Code and, in draft, consists of approximately 400 pages of typewritten material, single space, on 8½" by 11" paper.

"Will you please inform me, assuming that this measure is passed by the Board, whether or not it is necessary to publish it in the official newspaper as is required by charter provision for other ordinances."

OPINION

There are two questions asked:

1. What is meant by the term "immediately" as used in the charter of the City and County of San Francisco regarding the publication of ordinances; and

2. Do all ordinances have to be published, irrespective of their length?

Answering the questions in the order in which they are presented, you are advised that so far as the publication of emergency ordinances is concerned, the term "immediately" does not mean "instantaneously" but rather within a reasonable time after the happening of the event which requires the publication. See FRIEDMAN v. ORIENT INS. CO., 180 N. E. 617, where the court said:

> "The word 'immediate', as used in policy requiring immediate notice of loss, implies nothing less than due diligence to act with reasonable promptness under circumstances."

There are a host of other cases along the same line which hold that "immediate" is usually construed to mean within a reasonable time.

You are therefore advised that when it comes to the publication of emergency ordinances, the publication must be made within a reasonable time, and if your office should deem it advisable to proofread the ordinance before it is finally published, you are privileged to do so.

As to your second question in regarding to the ordinance pending before the board, which practically amends the building code, notwithstanding the length of this ordinance it must be published in the same manner as any other ordinance.

Respectfully submitted,

Board of Supervisors
JJO'T

CITY ATTORNEY

February 24, 1947

SUBJECT: FARMERS' MARKET; SALE OF SURPLUS APPLES BY COOPERATIVE ASSOCIATION.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"The Farmers' Market Ordinance adopted by the Board of Supervisors in April, 1946, and currently in effect provides:

"'The Chief Administrative Officer is hereby authorized to establish in the City and County of San Francisco a farmers market and to maintain the same and to direct the operations of said market for the sale of surplus or distressed fresh fruits and vegetables by the growers thereof in the State of California.'

"'Farm products may be sold or offered for sale at said market only by the grower thereof or by members of his immediate family, or by sales people.'

"There is a surplus of apples in the Watsonville area, much of which is held in cold storage facilities owned and managed by cooperative associations. These associations consists of two or more growers who pool their produce, keep it in cold storage, then sell it or a part of it, and distribute the proceeds of the sales to the grower members in proportion to their contributions to the stored supplies.

"I would like to have your opinion as soon as possible as to whether these apples, held by cooperatives in storage, may be sold at the Farmers' Market."

O P I N I O N

The Farmers' Market was established pursuant to Bill No. 3916, Ordinance 3758 (Series of 1939) for the sale of surplus or distressed fresh fruits and vegetables by the grower thereof, by members of his immediate family or by a hired sales employee of the grower.

Section 8 of the Ordinance provides in part:

"Farm products may be sold or offered for sale at said market only by the grower thereof or by members of his immediate family or by sales people . . . ."

Section 11 of the Ordinance provides:

"Any person who makes sales at the Farmers' Market or offers produce for sale in said market and who is not

the grower of the produce sold or offered for sale, or who is not a member of the grower's family or a hired sales employee of the grower, and any person who contracts or arranges with any other person to sell or offer for sale at said market any produce except as provided in this ordinance shall be guilty of a misdemeanor and shall be punished accordingly, and in addition to such punishment, said violator may be barred by the Chief Administrative Officer from further use of the facilities of said market."

It is clear from the above sections that the only person other than the grower or members of his immediate family who may sell produce at the Farmers' Market is "a hired sales employee of the grower".

I am of the opinion, therefore, that the cooperative association which you mention in your request cannot sell the apples at the Farmers' Market through any hired sales personnel who would be employees of the cooperative association. However, if the apples were to be returned by the cooperative association to the individual growers thereof, I am of the opinion that the apples could then be sold by the grower, members of his immediate family or a hired sales employee of the grower.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer
LSM

February 24, 1947.

SUBJECT: Veterans' Housing, Legality of "Rochester Plan" in Providing -

Gentlemen:

You have made the following request for an opinion:

REQUEST

"Would you kindly give me an opinion as soon as possible as to whether the 'Rochester Plan' could be used in San Francisco with regard to city-owned property.

First of all, I would like to know whether certain lands of the Water Department in the Glen Park area and otherlands of the San Francisco Fire Department in the Twin Peaks area, which are available, could be used for these purposes and sold to a corporation in accordance with the 'Rochester Plan'.

I call to your attention that under the 'Rochester Plan', it was held legal to sell lands to the corporation at a very low price and to give the corporation the land improved for building purposes with streets, sidewalks and other utilities on the basis that the city would receive the property with the improvements after the mortgage had been amortized.

Another question is whether the city could receive stock from the corporation in exchange for selling the land at a very low figure and making it tax-free for a period of time.

Can San Francisco legally assess properties used for veterans' homes under the 'Rochester Plan' at a low rate of assessment?

Can the city make the land tax-free for a period of years?

Could this project be construed to be a municipal project if the corporation was a non-profit corporation set up for providing homes for San Francisco veterans as under the 'Rochester Plan'?

Could the Housing Authority handle the building of the project as under the 'Rochester Plan' rather than a corporation to be formed and supported by banks and builders?"

OPINION

The exact details of the entire "Rochester Plan" are not known. The only information available at this time is provided by a magazine article written by Mr. Harry V. Odle entitled: "Providing Rental Housing for G. Is". In substance, the plan developed in Rochester, New York, by eight banks contemplates the formation of a non-profit corporation, "Rochester Civic Rental Project Inc.". The banks each purchased $2,000 of stock, resulting in a total working capital of $16,000. The legal details are scanty, but the following is pertinent:

"As its part in the subsidized program the city has sold the corporation a favorably located 10-acre tract of land at public auction for $1. It has agreed to install sidewalks, sewers, paved streets and parking areas for an estimated expenditure of $144,000. Furthermore, there will be a liberal concession on assessments, with the property to be valued at $350,000 whereas the total expenditure will run close to $1,000,000.

With the land and improvements serving as ample equity, arrangements have been made for the corporation to obtain a 90 per cent FHA mortgage sufficient to cover the cost of construction and landscaping. This mortgage will be issued to one bank as trustee, and the eight banks will acquire equal participations. Special permission was obtained from the State Banking Board to enable the savings bank to enter into such a participating plan. The mortgage will carry a rate of 2-½ per cent, and thus with the ½ per cent FHA insurance charge the cost to the corporation will be 3 per cent.

The corporation's contract with the city provides:

1. The apartmental rentals shall not be over $50 per month. Any rental over that amount must be approved by the city council.

2. All earnings from the rental project over and above the amount necessary to cover operating expenses, reserves and amortization requirements shall be used in a further reduction of the principal of the mortgage. The mortgage by its terms must amortize itself in 27 years, but it is expected that the supplementary payments may reduce the amortization period to 20 years.

3. When the mortgage is fully liquidated the property is to be sold at a price agreed to by the city council, and the proceeds are to be turned over to the city to be applied upon its indebtedness, or to be used for some capital improvements if there is not outstanding

debt. It is this provision which legally enables the city to provide the land, make assessment concessions, etc."

The following problems are suggested by the plan and your inquiry:

1) Sale of land to the corporation.
2) Installation of utilities and improvements at city expense.
3) Liberal concession on tax assessment.
4) Could the city sell the land at a nominal figure and make the land free for a period of time in return for stock in the corporation.
5) Can properties used for veterans' homes be preferentially assessed so as to reduce taxes.
6) Could the city make the land tax-free for a number of years.
7) If a non-profit corporation were organized to provide homes for veterans would the project be a municipal one.
8) Could the Housing Authority of San Francisco handle the building of the project rather than a non-profit corporation.

1) Sale of land to the corporation.

a. The sale of land by this municipality is governed by charter Section 92. The following procedure is established:

1. The department responsible for the administration of the property must recommend the sale.

2. The Board of Supervisors must authorize by ordinance the sale of the property.

3. The Director of Property thereupon shall make a preliminary appraisal of the property and advertise the time and place of the sale.

4. Upon receipt of tenders, the Director of Property reports to the department head and the Board of Supervisors the amount of such tender.

5. The supervisors may authorize the acceptance of the highest tender, or they may, by ordinance, authorize a sale at public auction.

6. No sale, other than at a public auction, shall be

authorized unless the sum offered shall be at least 90% of the preliminary appraisal.

In addition, Section 92 provides for the exchange of property with the recommendation of the department in charge of the land to be traded, and approval of the Board of Supervisors. It is possible that advantage might be taken of this procedure in providing city land, if the corporation had previously acquired some realty that would be suitable for exchange.

With reference to the sale of land to a private corporation, it is therefore concluded that:

1) The land could be sold at a private sale if the tender were 90% of the appraised value and were accepted by the supervisors, or

2) If no tender equal to 90% of the appraised value were received, or even if such tender were made, it need not be accepted and the supervisors could order a sale at public auction.

In answer to question number 4, it is the opinion of this office that the acceptance of stock in the corporation would not authorize a departure from the procedure established by Section 92 of the charter relating to the sale of land.

b. It would be possible to lease the land under the procedure outlined in Section 93, for not more than 20 years. In many ways, this might be the most satisfactory legal method of providing the land for this project. However, it is understood that a practical objection exists to this procedure if FHA financing is sought, since that agency requires a longer leasehold interest to secure its loans.

c. Another alternative would be in making a gift of city owned property to the corporation. Ignoring the practical problems involved, there is a serious legal question as to:

1. Whether such a gift is for a public purpose, and

2. Whether the means for alienating property as set forth in Sections 2 and 92 of the charter may not be the only or exclusive methods whereby transfer of city owned land can be made.

With reference to the first objection noted, since city owned property or funds can only be used for a public purpose (County of Los Angeles v. Dodge, 51 Cal. App. 492; Art. XI, Sec. 6, Art. IV, Sec. 31, Const.), the question arises whether the providing of permanent housing, as distinguished from emergency housing, for veterans is a public or

municipal purpose. It is impossible to answer this with certainty prior to a test by the courts, since obviously there are strong arguments on both sides. Each such case is decided on its own facts upon judicial review, although the courts generally defer to the decision of the legislative body as to whether or not the purpose is a public one. (Banks v. Bell, 62 Cal. App. 320).

Weighing both sides of the question, it is felt that there is a strong possibility that this program would be held not to be such a municipal purpose as would authorize the donation of city owned land to a private corporation.

2) Installation of utilities and improvements at public expense.

If the funds are available, it is believed that it would be a proper expenditure to install streets and sidewalks since they are generally considered a public purpose. (Oakland v. Garrison, 142 Cal. 298; Johnson Corp. v. Los Angeles, 198 Cal. 308).

The water department would be authorized to extend its mains for the purpose of obtaining new customers in the proposed housing unit. The providing of other utilities rests with private corporations, but it is not thought that any difficulty will be met in this direction.

3) Liberal concession on assessments.

No concessions can be granted if the title to the property is in a private corporation. Assessments and rate of taxation on privately owned property must be equal, or else they violate the fourteenth amendment of the Federal Constitution. (Green v. Louisville Ry. Co., 244 U. S. 499), and also Art. 13, Sec. 1 of the State Constitution (Green v. Gottstein, 66 Cal. App. 587). Thus, if the land were sold to a private non-profit corporation, a preferential assessment could not be made on its behalf.

If the city kept the title and operated the project, the land and improvements would be tax free. (Const. Art. 13, Sec. 1).

In reply to question 4, the mere fact that the city would be a shareholder in the corporation would not permit a preferential assessment. This is so, since the corporation is a separate entity from the shareholders, and would be in this case the same as any other private individual and not entitled to a preference.

In reply to questions 5 and 6, the state of the title would be determinative. If the city still owned the property, as noted above, then the property would be exempt from taxation. If the title were in a private corporation, it is immaterial whether the property is used for veterans' housing, for no preferential treatment because of that use, as to taxation, is legal. This conclusion is applicable

to question 6, since the city would not have the power to make land tax free for a number of years, such a procedure being in violation of Article XIII, Section 1, of the California Constitution.

7) If a non-profit corporation was organized to provide homes for veterans, would the project be a municipal one?

It appears that this query can mean several things. For the purpose of this opinion, it is assumed that it relates to the problem whether the city could authorize the proposed corporation to act as an alter ego. To achieve this, the city would be obliged to employ the corporation as an agent, to operate the project on behalf of the city. It is believed that this could only be done if the city kept title to the real property to be used, otherwise the fiction of agency would be so flimsy as to be useless. A somewhat similar factual arrangement in erecting and operating a municipal opera house was declared improper in Egan v. San Francisco, 165 Cal. 576. Much doubt has been cast on this holding by Futterer v. Sacramento, 196 Cal. 248; City of Oakland v. Williams, 206 Cal. 315; Harter v. San Jose, 141 Cal. 659, and County of Los Angeles v. Dodge, 51 Cal. App. 492. Though the authority of the Egan case hasbeen whittled away by distinctions, so far as can be discovered, it has never been overruled.

However, it is possible for a municipality to contract with a private individual or corporation to act as an administrative agent, (Chamber of Commerce v. Stephens, 212 Cal. 607), and it appears that the proposed corporation in this case could similarly be employed. A disadvantage of such a procedure would be the difficult legal problem involved in drafting an agency agreement that would be upheld by the courts, but this could no doubt be accomplished.

The project would be a municipal one within the limitations mentioned, if a private corporation were employed as an agent of the city for this purpose.

8) Could the Housing Authority of San Francisco handle the building of the project rather than a non-profit corporation?

This inquiry has two phases. So far as the city is concerned, it could employ the Housing Authority as an agent under the condition noted in reply to question 7.

With relation to the Housing Authority, there is doubt as to its ability to act, either as an agent to construct the project on municipally owned property, or on land owned by the Authority. This arises from the fact that the Authority is a state created corporation (Deering's General Laws, Act 3483, Sec. 4) and is limited in purpose and powers to slum clearance and operation of housing projects for low

income groups (Sections 3, 8). Since it does not appear that the veterans' project contemplates slum clearance or is for the benefit of low income families as such, no doubt some amendment would be required as to the existing State law before the Housing Authority could act. This was, in fact, necessary to permit the Housing Authority to administer War Housing Projects (Deering's General Laws, Act 3487, Section 2) and presumably a similar amendment would be needed for the operation of city sponsored veterans' housing.

Conclusion

Different legal problems exist in this state with relation to such veterans' housing programs than exist in New York. In that state there is no "home rule" as such and the legislature may authorize the municipality to do acts that would ordinarily be beyond the scope of "municipal affairs".

The statement contained in paragraph 3 of the quoted portion of the article, that the city is to receive the proceeds of the sale of this land, and therefore the city is authorized to provide the land, reduce assessments and make improvements, is vague and uncertain and there is no apparent legal justification for its being made.

It appears that by considerable readjustment of the so-called "Rochester Plan" a similar program could be adapted to the legal problems of this municipality.

Respectfully submitted,

Board of Supervisors CITY ATTORNEY

CC - Mayor

GAH

3/r 8

February 26, 1947.

SUBJECT: Adoption of Annual Budget by Motion.

Dear Sirs:

You have requested an opinion as follows:

"You are hereby respectfully requested to furnish the undersigned with your written opinion as to the proper form of action to be taken by the Board of Supervisors in approving the annual budget of the city and county.

"Section 72 of the charter provides in part that 'the board shall adopt the proposed budget.' Section 13 provides in part that 'action by the board of supervisors shall be by ordinance or resolution in writing.' The practice followed by the board in past years has been to approve the annual budget by motion.

"It is because of the apparent inconsistency between the board's action and the charter provisions that your opinion is requested."

OPINION.

Action by the board of supervisors is in general by enactment of an ordinance or adoption of a resolution. Action also may be by adoption of a budget, by approval or disapproval of action of other bodies, and by other methods. A motion, as used by the board in regard to any of these matters, is only a matter of parliamentary procedure. For instance, a motion may be made to adopt either a resolution or a budget, or even to pass an ordinance.

If a resolution were used for the purpose of adopting the budget, it would be merely a matter of parliamentary procedure. While a resolution would be valid to accomplish the purpose, it would only be incidental to the adoption of the budget, which would be the real action of the board. A resolution for such a purpose would not be a main subject matter, such as the words resolution and ordinance refer to in section 13 of the charter.

The procedure used of adoption of the budget by motion is appropriate for the purpose, and, for the reasons stated above, I regard it as preferential to adoption by resolution.

Respectfully submitted,

City Attorney.

To: Board of Supervisors,
cc: Hon. Roger D. Lapham, Mayor.

WP

March 5, 1947

SUBJECT: CALCULATING COSTS OF ALTERATIONS TO NON-CONFORMING USE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"In dealing with non-conforming uses of the Building Zone Ordinance, Article 1, Section 9, which states in part --

> "The cost of reconstruction or structural alteration of such building shall in no case exceed 50% of its assessed value, nor shall the building be enlarged unless the use thereof is changed to a conforming use" --

the City Planning Commission desires your opinion of the following actual case:

(1) An entire building has a non-conforming light industrial status;

(2) It is proposed that 90% of the building is to be in a conforming use after alterations;

(3) 10% of the building is still in a non-conforming status after alterations;

(4) The cost of alterations of this non-conforming building will be more than 50% of the assessed value of the structure;

(5) Practically all the cost of the alterations will be spent on the conforming use.

"<u>Question for an Opinion</u>:

Under the above, can a building application be approved by the City Planning Commission and conform to Article 1, Section 9 of the Building Zone Ordinance?

The City Planning Commission will appreciate your opinion on this matter."

<u>O P I N I O N</u>

Section 9, Article 1, Chapter II, Part II, of the San Francisco Municipal Code on Non-conforming Buildings and Uses provides in part as follows:

"Any non-conforming use (existing on the 26th day of September, 1921, may be continued) and any existing building designed, arranged, intended or devoted to a non-conforming use may be reconstructed or structurally altered and the non-conforming use therein changed subject to the following regulations:

(a) The cost of reconstruction or structural alteration of such a building shall in no case exceed fifty (50%) per cent of its assessed value, nor shall the building be enlarged unless the use thereof is changed to a conforming use; . . . "

In your actual case, as submitted, it appears that one whole building which has a non-conforming (light industrial) status is sought to be altered. Apparently the non-conforming status of the property is necessary to be retained, as you state that a portion of the cost of the alterations is to be directly used for an alteration, as well as continuance, of the non-conforming use and status of the property. The fact that portions of the whole building will be devoted to uses which might otherwise be classified as "conforming" does not change the status of the whole property as a "non-conforming" use.

Hence, in determining whether the cost of the proposed reconstruction or structural alteration of the property exceeds 50% of the property's assessed value, the cost of the improvement to the <u>whole property</u> must be considered as the value and cost of the improvement made -- and the cost of improvement is not severable for such a whole building between so-called "non-conforming" costs and "conforming" costs.

It would appear that the City Planning Commission would not be justified in approving a building application under the circumstances as submitted as the costs of the alterations to be made would be in excess of that permitted under Section 9, Article 1, Chapter II, Part II of the San Francisco Municipal Code.

Respectfully submitted,

City Attorney.

To: City Planning Commission.
MSW

March 7, 1947

SUBJECT: HOSPITALS, LICENSING OF, UNDER STATE DEPARTMENT OF HEALTH.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"Please give us an opinion in the following matter:

"On November 22, 1946, an opinion was received from your office regarding the licensing and inspection of hospitals and nursing homes.

'Chapter 1418, Statutes of 1945, which now appears as Subdivision 2, Chapter 2, Section 1400-1418, inclusive, of the Health and Safety Code reads in part as follows:

'Section 1 ....prepared and furnished by the department,

'From a reading of the above provisions of the Health and Safety Code and the general law on the subject, the licensing inspection, regulation, etc., of hospitals is now made a matter of state-wide interest and concern and hence no longer have the local authorities any control over the licensing of this type of hospital.'

"In view of the above, we wish your advice as to whether we should continue the licensing and inspection of hospitals and nursing homes under our local ordinances, Section 157, Chapter V, Part II, and Section 158, Chapter V, Part II, Municipal Health Code, or should the necessary steps be taken to have these ordinances repealed."

OPINION.

In the light of my opinion to you, dated November 22, 1946, wherein I stated that under the provisions of sections 1400-1418 of the State Health and Safety Code, the licensing, inspection, regulation and supervision of public and private hospitals within the state was made a matter of statewide interest and concern, and the local authorities no longer have any control over the licensing thereof, the local ordinances on the licensing and inspection of such hospitals would appear to be supplanted and replaced by the State law.

Respectfully submitted,

Jno. J. O'Toole
City Attorney

To: Department of Public Health.
cc. To Chief Administrative Officer.

NSW

March 10, 1947

SUBJECT: 40' HEIGHT LIMITATION ON FRAME OR WOODEN BUILDING NOT APPLICABLE TO BUILDING ERECTED TO 53' HEIGHT IN 1904.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion wherein you state that the owner of property in a Second Residential District desires to improve this property and to continue to put it to a use permitted in a Second Residential District. You further state that the owner of the building in question proposes to spend over $20,000.00 in improving the same, while the assessed value of the building is $2,100.00; and that the building as now erected (and as built in 1904) has a height of 53' from the sidewalk level, while "Frame or wooden" buildings under the present provisions of the Building Code are limited to 40'.

You ask whether the proposed improvement to this building is in violation of the zoning law? You further ask whether this improvement would be permissible under the height limitation provision of the building code affecting "Frame or wooden" buildings?

O P I N I O N

From the facts as above related there would appear to be no violation of the zoning law. The limitation on the amount of money that may be spent on improving property appears in the "non-conforming" provision of the zoning law. Here, you present no "non-conforming" use situation because you state the property is zoned for a Second Residential use and is being used, and will continue to be used, for a use permitted in a Second Residential District. The 53' height of the structure does not violate any provision of the zoning law.

The limitation of 40' appears in Sections 520 and 521 of Article 15, Chapter I, Part II, of the San Francisco Municipal Code, which is a restriction in the Building Code against building a "Frame or wooden" building more than 40' in height. However, this restriction on the height of a "wooden or frame" building does not apply to an improvement of a structure, such as is here involved, where the building was duly erected in 1904 and no enlargement of its height is contemplated over the 53' as duly erected in 1904.

You are therefore advised that the proposed improvement to the building in question is not in violation of any provision of the zoning law. You are further advised that while "Frame or Wooden" buildings are now limited to a height of 40', the height restriction

is not applicable to the structure here involved which was duly erected to its present height of 53' in 1904 and has remained at that height to the present date.

Respectfully submitted,

CITY ATTORNEY.

To: Board of Permit Appeals.

MSW

3727

March 17, 1947

SUBJECT: DISCRETIONARY POWERS OF BOARD OF PERMIT APPEALS DOES NOT PERMIT IT TO VIOLATE HEIGHT LIMITATION PROVISION OF BUILDING CODE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

> "'The owner of a frame building, located at 5125 Geary Blvd., wishes to raise the building to a height of 43 feet at one point, 41 feet 9 inches to another point thereby exceeding the existing 40 foot height limit of a frame construction building'.
>
> "Can the Board of Permit Appeals, under its discretionary powers, grant the concession, asked for, namely, exceed the existing 40 foot frame construction building height law?"

O P I N I O N

Section 521, Article 15, Chapter I, Part II of the San Francisco Municipal Code (Building Code) provides as follows:

> "Frame or wooden buildings shall be limited to a height of forty (40) feet, according to the following provisions***".

You state that the building in question is such a "frame or wooden" structure.

The discretionary power accorded to the Board of Permit Appeals does not extend so far as to permit it to allow, much less create, an express violation of the height limitations of the Building Code. The case of Lindell Co. v. Board of Permit Appeals, 23 Cal (2d) 303, does not even remotely indicate or suggest that the Board of Permit Appeals possesses any such power.

You are therefore advised that the Board of Permit Appeals cannot grant the permit here sought.

Respectfully submitted,

To: Board of Permit Appeals

CITY ATTORNEY

MSW

March 25, 1947.

SUBJECT: Power of Board of Supervisors to Request City Planning Commission to Consider Amendment of Master Plan - Section 22 of the Charter Discussed.

Gentlemen:

You have requested an opinion on the propriety of the following resolution, with special reference to Section 22 of the charter:

> "WHEREAS, It is the considered opinion and policy of this Board of Supervisors that provision should be made as soon as possible for the entry of transcontinental trains into San Francisco and for the construction of a Union Terminal; now, therefore, be it
>
> "RESOLVED, That this Board of Supervisors does hereby petition the City Planning Commission and does respectfully request that consideration be given to an amendment of the Master Plan to reflect the policy herein announced."

OPINION

The resolution refers to a subject within the scope of the Master Plan, the entry of transcontinental trains into San Francisco and the construction of a Union Terminal. The subject is one properly before the Board of Supervisors as a municipal affair related to the action of the Board in regard to a proposed second transbay bridge. The resolution requests the Planning Commission to consider the subject stated in relation to the Master Plan.

The Master Plan is in the nature of expert information and opinion on the subjects treated in it. It is recommendatory in nature and its purpose is the guidance of city officials in the performance of functions affecting subjects treated in the Plan.

The resolution of the Board of Supervisors must be understood, not to request action of a certain character by the Planning Commission, but rather a study of a certain subject in relation to the Master Plan. In this sense the resolution is valid, but is not binding on the Commission.

Section 22 of the charter contemplates necessary dealings of the Board of Supervisors with officers, boards and commissions, prescribes the method and limits it. It is of a positive character, as well as a negative, and attempts to chart a course for desirable cooperation.

In an opinion given by me on January 20, 1934, the following statement was made in regard to Section 22:

> "* * * if the matter is one which the board has the right to investigate or inquire into in the exercise of that right it is entitled to receive all available information that it desires on the subject, and when such information is requested it should be by board action. On the other hand, the clear intent of Section 22 is to prevent the board from meddling in Administrative affairs. There should be cooperation by the several departments as well as by the board that the spirit of the section be carried out."

In conclusion, it seems to me, in regard to the subject resolution, that although it is stated argumentatively, it is in fact properly interpreted as a request for information through the Master Plan in a manner which will render a cooperative service within both the spirit and letter of Section 22 of the charter.

Respectfully submitted,

CITY ATTORNEY

City Planning Commission

WP

March 26, 1947

SUBJECT: ELECTIVE OFFICIALS, INCREASE OF SALARY OF INCUMBENTS.

Gentlemen:

You have requested an opinion as follows:

> "Whether salaries for elective officials set by salary standardization can be increased for incumbents, considering the fact that they do not become effective until July 1st and in view of the Constitutional provision relative to increasing salary of incumbent officials."

O P I N I O N

An opinion on this subject was given to the Civil Service Commission under date of November 15, 1946. A copy of this opinion is attached hereto for your information.

As to your reference to the date of July 1, 1947 when the increased salaries are to go into effect, I presume you have in mind the fact that this date is more than six months after the proclamation of the President of the United States on December 31, 1946, proclaiming the cessation of hostilities in World War II as of noon of that day.

You will note, however, that the opinion given last November 15th is upon two grounds, and that only the second of these grounds has to do with the wartime suspension of the prohibition against increase of salaries during term of elective office. The first ground is conclusive in itself as to the validity of these increases. It is fully stated in the opinion and will not be repeated here. I should note, however, that since the writing of this opinion the case of Pulcifer v. County of Alameda, 29 A.C. 259, has given support to the first ground above referred to. It has done this by calling attention to the fact that when Article XI, Section 5, was amended to provide for a prohibition against increase of salary to incumbents, the section was also amended to exclude application to chartered counties and cities and counties.

As to the second ground, let us assume that the proclamation of the President is a proclamation of the termination of hostilities within the meaning of Article XI, Section 5 of the State Constitution and Chapter 5 of Statutes of 1945. The fact remains that the Salary Standardization Ordinance, the budget for 1947-1948, and the annual appropriation ordinance and salary ordinance for that year all will have been finally passed and adopted well before the expiration of the period of six months after the termination of hostilities. During the period while the prohibition against action increasing salaries is still suspended, both the Board of Supervisors and the Mayor will have completed all their action in that regard.

The only prohibition is against the act of increase after election or during term and that act will have been completed during the suspension.

The fact that the increase commences after the end of the suspension is unimportant. To illustrate, the salary of an officer, even under the prohibition, might be, during a four year term, five thousand dollars the first year, six thousand dollars the second year, seven thousand dollars the third and eight thousand dollars the fourth. The increase would not be illegal so long as the legislation increasing the salary was enacted at a time when it was legal to do so. That would be before the officer's election, or, in the case under discussion, before the expiration of six months after the proclamation of December 31, 1946.

During the period of the suspension there is no bar against the increase of salaries of elective officers. It is therefore legal, during the suspension, to pass the salary standardization ordinance, adopt the budget, and pass the appropriation ordinance and salary ordinance, all providing for the increases referred to in your inquiry.

The recent decisions of Busch v. Turner, 26 Cal. (2d) 817, and Holland v. Byram, 28 A.C. 580, are in line with the reasoning of both my opinions given on this subject.

Respectfully submitted,

CITY ATTORNEY

To: Finance Committee
Board of Supervisors
cc: Mayor Roger Lapham
WP

2930

March 31, 1947.

SUBJECT: Assembly Bill No. 857, "Expenditure and Tax Act" Applicable to San Francisco

Dear Sir:

You have asked for an opinion as to whether Assembly Bill No. 857 would be effective in regard to expenditures and tax revenues of San Francisco. Only the first sentence of the bill need be discussed here, as the remainder of it provides the procedure for notice of hearing, hearing and method and base in determination of increase of expenditures and taxes. That sentence is as follows:

> "Notwithstanding any provision of law to the contrary, no county, city and county or district shall increase its expenditures (exclusive of bond interest and redemption) nor the amount of taxes levied by it upon real and personal property or upon real property except by a two-thirds (2/3) or more vote of the governing board."

OPINION

The bill refers, first, to expenditures and, second, to taxes upon real and personal property. It prevents an increase in either of these, except on two-thirds vote of the local governing board. Increase of expenditures will be discussed first, and taxes second.

1. INCREASE OF EXPENDITURES

Section 20, Article XI, of the State Constitution, provides, among other things, that expenditures of a city and county, including one operating under a freeholders' charter, for other than bond interest and redemption, shall not exceed the preceding year by more than five percent unless previously authorized by the electors or the State Board of Equalization.

This limitation expired in 1935 by the terms of the section, with the provision that the legislature might later impose the same limitations for such periods as it might determine. This has been held to include the imposition of a less limitation than that specified in the constitutional provision. LOS ANGELES, etc. CORP. v. CITY COUNCIL, 18 Cal. App. (2d) 97, 103.

The bill attempts to impose a greater limitation; that is, any increase at all is prohibited, except upon a different condition, a two-thirds vote, not of the electors, but of the governing body. In

this respect, I regard the bill as void and of no application to San Francisco.

This position is supported by the case of ROBISON v. PAYNE, 20 Cal. App. (2d) 103. This case held that the legislature had power to continue limitations on expenditures of political subdivisions, as provided by the constitutional provision, but that to be valid, the limitations specified by the legislature must be the same limitations as those contained in the constitutional section.

The case holds the legislative act, Chapter 356, Statutes of 1935, to be void. The opinion states in part as follows:

> "A comparison of the statute with the Constitution reveals that the statute allows an increase over the 5 per cent limitation if a majority of the electors of the political subdivision involved authorize an increase, whereas article XI, section 20 of the Constitution requires a two-thirds vote. The constitution requires that the 5 per cent increase in expenditures each year be based upon the expenditures of the preceding year, while the statute provides for cumulative expenditures in cases where the political subdivision has not increased its expenditures by 5 per cent over the preceding year. Differences also exist between the Constitution and the statute in fixing the base for determining the maximum, and also in the meaning of 'expenditures' as used in the respective acts.
>
> "Having concluded that the legislature was obligated if it desired to continue the limitations on expenditures in force, to reenact the conditions set out in the Constitution, the next question is, is chapter 356, Statutes of 1935, in violation in whole or in part of article XI, section 20, of the Constitution?
>
> "There is no doubt that an act of the legislature which conflicts with the Constitution is void (In re Shattuck, 208 Cal. 6; 279 Pac. 998), but it is also an accepted principle that a provision or part of an act may be unconstitutional, and still the whole act may not be void. (Paladini v. Superior Court, 178 Cal. 369; 173 Pac. 588; Beneficial Loan Soc. v. Haight, 215 Cal. 506; 11 Pac. (2d) 857). It is necessary, however, if the constitutional portions of the statute are to stand alone and remain in full force, that they can be separated from the unconstitutional portions. (Riley v. Chambers, 181 Cal. 589; 185 Pac. 855, 8 A. L. R. 418; In re Weisberg, 215 Cal. 624, 12 Pac. (2d) 446; People v. Yosemite Lumber Co., 191 Cal. 267, 216 Pac. 39.)
>
> "This doctrine should be applied, however, only

where (1) the parts are so distinctly separable that one can stand without the other, and (2d) where the court is able to see that the intention of the legislature was that the part declared valid should be enforceable, even though the other parts should fail. (In re Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138; People v. Monterey Fish Products Co., 195 Cal. 648, 234 Pac. 398, 38 A. L. R. 1186; City of Stockton v. Frisbie & Latta, 93 Cal. App. 277, 270 Pac. 270; Pasadena High School Dist. v. Upjohn, 206 Cal. 775; 276 Pac.341, 63 A. L. R. 408.)

"Applying those principles to the statute before us and recalling the variances between the statute and the Constitution, we find clear conflict, not in its minor provisions but in its fundamentals existing between the two. The conflicting provisions in the statute are inseparable from the rest of the act, and if the conflicting provisions are eliminated we cannot say the act would then express the true intention of the legislature.

"We are of the opinion, therefore, that chapter 356, Statutes of 1935, violates article XI, section 20, and is invalid, and there being now no limitation on expenditures, the judgment of the trial court must be reversed. It is so ordered."

2. INCREASE OF TAXES

The second paragraph of Section 20, Article XI, of the State Constitution has reference, not to expenditures, but to taxes. It is not subject to the limitations of the preceding paragraph as to expenditures. It is as follows:

"On and after January 1, 1935, the Legislature shall have power, by two-thirds vote of all the members elected to each of the two houses, to limit the amount of taxes which may be imposed upon real and personal property according to the value thereof for county or city and county purposes."

The first question is whether the tax provisions of the bill are not separable from the void provisions as to expenditures, and hence void also. They seem closely related in the bill, but might possibly be regarded by a court in a case binding on San Francisco as separable in nature and not vitiated by the invalidity of the provisions of the bill relating to expenditures. Hence, for the purpose hereof, the tax provisions should be regarded as separable from the expenditure provisions.

"City and county", as used in the first paragraph of Section 20, Article XI, specifically includes a city and county having a freeholders' charter. It is proper to assume that these words are intended to have the same meaning in the second paragraph, the one above quoted.

"Governing board", as used in the bill should be taken to include reference to our Board of Supervisors.

A prohibition against increase of taxes upon real and personal property or real property, except by two-thirds vote of the Board, as stated in the bill, is a form of limitation upon the amount of taxes which may be imposed upon such property, as stated in the constitutional section. This limitation is therefore authorized by the Constitution, upon two-thirds vote of all members of each house of the Legislature.

Othere differences in wording between the tax provisions of the bill and the constitutional section do not require note here.

My conclusion is, therefore, that the bill, if enacted, would not be valid as a limitation upon increase of expenditures of the city and county, but that the bill would be valid as to taxes of the types referred to in it, which might be levied after its effective date.

Respectfully submitted,

CITY ATTORNEY

Chief Administrative Officer

CC - Controller

WP

April 2, 1947

SUBJECT: LAW AS TO PARCELS CONSTITUTING A "SUBDIVISION", AND PARCELS NOT INCLUDED IN THE DEFINITION OF A SUBDIVISION.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"Enclosed herewith is a copy of a protest by numerous property owners in the vicinity of 4th Avenue and Kirkham Street, also accompanying this protest is a copy of the Minimum Lot Size Ordinance No. 4162, which the letter of protest refers to.

"The City Planning Commission, as well as the protestants, desires an interpretation of Section 99, Part (a), New Subdivisions - Lot Areas and part (c), Resubdivisions.

"Existing physical conditions relative to the interpretation:

"(1) The west side of 4th Avenue between Parnassus Avenue and Kirkham Streets is a built up area, the lots have a frontage of 25 feet and a depth of 120 feet. The street is paved.

"(2) On the east side of 4th Avenue there is no development except the U. C. Hospital which is located on the northeast corner of Parnassus and 4th Avenues and extends approximately 100 feet south along the east line of 4th Avenue.

"(3) The area in question is 237 feet along the east line of 4th Avenue commencing on the south line of Kirkham and extending north. The area is known as Lot 4A in Assessor's Block 2643A.

"(4) The total acreage of the Lot 4A is 2.24 which is shown on the accompanying map.

"Proposal filed by applicant relative to the interpretation:

"(1) Building applications have been filed with the Central Permit Department for seven homes. The lots have a 25-foot frontage and are 100 feet in depth. (See map)

"Miscellaneous information relative to the interpretation:

"(1) The 1943 Subdivision Map Act, Article 3, Section 11535, gives a definition of a subdivision.

"Question for interpretation:

"(1) Under the minimum Lot Size Ordinance No. 4162, Section 99,

part (a) --

"Is this proposal a new subdivision and should it conform in dimensions to the neighborhood pattern as determined by the City Planning Commission, or

"Is it a resubdivision under part (c), which requires the lots to be subdivided to 2500 square feet with 25-foot frontage?

"Any additional information you may require, please feel free to ask.

"The City Planning Commission appreciates your interpretation of this portion of the Ordinance."

O P I N I O N

Section 99 of Article 4, Chapter II, Part II of the San Francisco Municipal Code, on regulating subdivisions of land and use of lots for dwellin purposes, provides in part as follows:

"(a) New Subdivisions - Lot Areas. In all areas hereafter subdivided, where a subdivision map is to be filed for approval, all lot lines shall be shown on said map, and such lots shall conform in dimension to the neighborhood pattern as determined by the City Planning Commission. Where a neighborhood pattern does not exist, lots shall have a width of not less than 33 feet. No subdivision shall be approved which does not comply with the provisions of this section.

". . . (c) Resubdivision. Except as provided in Subdivisions (d) and (e) hereof, in any area previously subdivided no lot or land unit shall be established and indicated upon a map or maps filed for record which has an area less than 2500 square feet, or a width less than 25 feet, and no building shall be constructed upon any such lot which will cover more than 65 per cent of the lot area, or which provides for an open rear yard less than 15 feet in depth."

Section 11535 of the Business and Professions Code of California defines a "Subdivision" as follows:

"Subdivision: Definition: Parcels not included: Filing Record of survey map: Land dedicated for cemetery purposes.

"(a) /Definition./ "Subdivision" refers to any land or portion thereof, shown on the last preceding tax roll as a unit or as contiguous units, which is divided for the purpose of

sale, whether immediate or future, by any subdivider, into five or more parcels within any one-year period.

"(b) /Parcels not included./ 'Subdivision' does not include either of the following:

"(1) Any parcel or parcels of land in which all of the following conditions are present: (I) Which contain less than five acres, (II) which abut upon dedicated streets or highways, (III) in which street opening or widening is not required by the governing body in dividing the land into lots or parcels, and (IV) the lot design meets the approval of the governing body.

"(2) Any parcel or parcels of land divided into lots or parcels, each of a net area of one acre or more, a tentative map of which has been submitted to the governing body and has been approved by it as to street alignment and widths, drainage provisions and lot design.

"(c) /Filing record of survey map./ In either case provided in subsection (b) of this section, there shall be filed a record of survey map pursuant only to the provisions of Chapter 15 of Division 3 of this code.

"(d) /Land dedicated for cemetery purposes./ Nothing contained in this chapter shall apply to land dedicated for cemetery purposes under the Health and Safety Code of the State of California."

From the facts furnished to me it appears that no "subdivision map", in accordance with law, has ever been filed in connection with the property in question. Under these circumstances we do not have involved here any question of a "resubdivision", (under Municipal Code, supra, 99c), as a "resubdivision" contemplates action in connection with an area previously duly "subdivided".

Thus, the only question here involved appears to be whether the property is a "subdivision" as that term is defined in section 11535(a) of the Business and Professions Code, or whether this property can come within the parcels excluded from this definition, by subdivision (b)(1) (supra) thereof. If this property is a "subdivision", as thus defined, a proper subdivision map, or maps, must be filed in accordance with law. If this property is considered as not included in the definition of a subdivision, then no subdivision map, or maps, need be filed, and this determination by the Board of Supervisors would be tantamount to granting the application as made.

It would appear that the applicant meets the requirements of sub-

sections, (I), (II), and (III) of subdivision (b) (1) (supra) of parcels excluded from the definition of a "subdivision". The last subsection (IV) thereof, however, contains the requirement that "the lot design meets the approval of the governing body".

Under ordinance No. 2250 of the Board of Supervisors (Finally passed July 26, 1943) the Director of Public Works is designated as "the advisory agency" under section 11509 of the Business and Professions Code of California, and charged with the duty of making investigations and reports of the design and improvement of any proposed subdivision of real estate in San Francisco. Under this same ordinance the Board of Supervisors recognizes itself as the "governing body" in such matters.

It is therefore a matter committed to the sound discretion of the Board of Supervisors, as the "governing body" to determine whether the "lot design" as submitted by the applicant meets with the Board's approval.

If it does meet with the Board's approval, then no subdivision map or maps need be filed, and such a determination by the Board would constitute a granting of the application as made. If, the "lot design", as submitted by the applicant, does not meet with the Board's approval then the applicant would have to file a subdivision map or maps if he desired to subdivide the property as requested.

You are thus advised in connection with your inquiry as submitted.

Respectfully submitted,

CITY ATTORNEY

To: City Planning Commission
MSW

April 2, 1947

SUBJECT: FIRE DEPARTMENT AND SALVAGE CORPS, PROMOTIONAL EXAMINATIONS TO LIEUTENANT IN; SALVAGE CORPS AND FIRE DEPARTMENT, PROMOTIONAL EXAMINATIONS TO LIEUTENANT IN; LIEUTENANT FIRE DEPARTMENT AND SALVAGE CORPS, PROMOTIONAL EXAMINATIONS FOR POSITIONS OF;

Gentlemen:

You have requested the opinion of this office as follows:

> "We are announcing promotive examinations to the rank of Lieutenant, Fire Department, and Lieutenant, Salvage Corps.
>
> "Will you kindly refer to the provisions of section 38.1 of the charter and advise us if member of the Fire Department in the entrance rank as Fireman may participate in the examination for promotion to Lieutenant, Salvage Corps, and if Firemen, Salvage Corps may participate in the examination for Lieutenant, Fire Department.
>
> "Your early response will be appreciated as we desire to announce these examinations at the next meeting of the Civil Service Commission."

O P I N I O N

Section 38.1 creates a salvage corps, as a division of the fire department, and is under the jurisdiction of the fire commissioners.

The blanketing in of certain members of the Underwriters' Fire Patrol of San Francisco into this corps is provided for. Employees subsequently added shall be appointed pursuant to the civil service provisions of the charter.

The following language is controlling:

> " . . . The personnel of said salvage corps shall not be transferred to any other branch or division of the fire department but shall at all times be subject to the orders of the chief engineer of the department in so far as actual service is concerned. The personnel of said salvage corps may be increased in accordance with the fiscal and budgetary procedure provided for in the charter, but members of any other branch or division of said fire department shall not be transferred

to said salvage corps except after examination and certification as to eligibility by the civil service commission."

It is the intent of the charter to maintain the salvage corps as a separate division of the fire department, and the personnel of this corps are not to have their duties changed to other work within the department. No exception is stated in the charter. The same intent is manifested, as to members of other branches of the fire department, that they shall not be transferred to the salvage corps. However, an exception is made in the latter case, namely that it is possible to make such a transfer from other divisions of the department to the salvage corps upon taking examination and certification as to eligibility by your commission.

By expressly making an exception in one case, applying the maxim of "expresio unius, exclusio alterius", it necessarily follows that the members of the salvage corps were not intended to be permitted to transfer to other branches or services of the fire department by examination or otherwise.

It is my opinion that Firemen in the fire department are eligible to take the examinations for Lieutenant in the salvage corps. On the other hand, Firemen, Salvage Corps may not take the examination for Lieutenant in the fire department.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission
GAH

April 3, 1947

SUBJECT: SERVICE RETIREMENT ALLOWANCE AFTER ATTAINING THE AGE OF 60 YEARS.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"A question has risen about the interpretation of the following two sentences appearing in subsection (B) of Section 165.2, of the Charter:

"'A member retired after reaching the age of sixty years shall receive a service retirement allowance at the rate of 1-2/3% of said average final compensation for each year of service. The service retirement allowance of any member retiring, after rendering twenty years or more of such service, and having attained the age of fifty-five years, computed under subsection (G), shall be such as can be provided at the age of retirement by the actuarial value, at the age of retirement, of the retirement allowance to which he would be entitled upon retirement at age sixty and with the service credited at the date of actual retirement.'

"I thought I should submit the following statements in connection with the matter:

"1 - The age and service requirements for service retirement, as given in subsection (B) are

"(a) the attainment of age sixty with credit for at least ten years of service, or

"(b) the attainment of age fifty-five with credit for at least twenty years of service.

"2 - The second sentence quoted above clearly provides, in effect, for the discount, if retirement is below 60, of the percentage per year provided at age 60, so that the allowance at the lower age shall be the actuarial equivalent of the allowance based on the service credited, at 1-2/3% per year, but deferred to age 60, i.e., to which he <u>would be</u> entitled at age 60.

"3 - The question at issue is whether the second sentence also provides for the accumulation of the 1-2/3% and its application at the higher age's lower annuity rate, in the event retirement takes place after age sixty, so that the allowance at the higher age shall be actuarially equivalent to an allowance at

60, based on service credited, including service rendered after age 60.

"4 - The actuarial valuation required in charter section 158 was made on the basis of 1-2/3 per cent per year if retirement is 'after reaching the age of sixty' and a discounted percent for retirement below age 60. The proposed section 165.2 was submitted to the electorate on the basis of the actuarial valuation. These statements about the actuarial valuation are made, because of a possible question as to the validity of the charter amendment, if it is found to provide a greater percentage than 1-2/3, upon service retirement after sixty.

"You are requested to advise the retirement board, therefore, as to whether a member retiring for service after attaining age sixty, is entitled to have his allowance calculated on the basis of 1-2/3 percent of his average final compensation for each year of service, or whether that percentage is to be accumulated in such a manner as to make the allowance at the higher age, actuarily equivalent to an allowance at 60, based on 1-2/3 percent for each year of service credited at the higher age."

O P I N I O N

Your request for an opinion involves an interpretation of the two sentences you quote at the outset of your letter (which is incorporated above), and which sentences are taken from subsection (B) of section 165.2 of the charter.

The first sentence thereof in substance provides for the service retirement allowance of any member retiring after reaching the age of sixty years. The second sentence thereof in substance provides for the service retirement allowance of any member retiring between the age of fifty-five years and sixty years, and covering retirement during that period only.

The reference to twenty years of service in the second sentence is only a recognition of the provisions of our retirement law that an employee between fifty-five and sixty years of age can only retire for service provided he has twenty years of service behind him, as distinguished from his right to retire after reaching sixty years of age with only ten years of service behind him.

You are therefore advised that the benefits to which a member would be entitled who retires for service after attaining age sixty are those set forth in the first sentence above referred to, i.e. his retirement

allowance would be calculated on the basis of 1-2/3% of his average final compensation for each year of service.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board
NSW

April 9, 1947

Subject: A Lottery is illegal in California.

Dear Sir:

You have advised me that a staid citizen, an outstanding gentleman of the business world and one almost impeccable has suggested to you as a means of new sources of revenue out of which to help pay for the mounting cost of the Municipal Government, that the City should conduct a lottery. You have presented the query, may a lottery legally be conducted by the City and County of San Francisco?

OPINION

Your attention is respectfully directed to section 26 of Article IV of the Constitution of California, which reads, in part, as follows:

> "The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery * * *."

A lottery is defined by section 319 of the Penal Code and this is the definition given:

> "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

Section 320 of the same code provides:

> "Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor."

An attempt was made in the City of Los Angeles to operate a lottery under an ordinance in effect in that city, and this ordinance was subject to review in the case of

People v. Settles (Appell. Dept. L.A. Super. Ct. 1938), 29 Ca. App. (2d) 781,

in which case the defendant was convicted of operating a lottery. He maintained it was a game of skill and relied upon a license from the City of Los Angeles. That municipality had an ordinance authorizing the Police Commission to determine whether a particular game was one of skill and, if determining this question in the affirmative, to issue a license to conduct the same. In holding the ordinance void, the Court stated (bottom of p. 785):

> "The law prohibiting lotteries is a part of the Penal Code, enacted by the state legislature in its exercise of the general police power of the state and in obedience to a constitutional mandate found in section 26, article IV, of our State Constitution. With such enactments cities have no power to interfere. The state has not confided to the police commission any authority in the enforcement of the lottery statute or any power to determine what is and what is not a violation thereof. The city cannot confer such jurisdiction, no matter how strongly it may attempt to do so, for this is not a municipal affair."

In view of what has been above stated, I regretfully advise you that other sources of revenue must be sought, and until the people of the state have amended the Constitution of California and the Board of Supervisors has enacted proper ordinances in conformity with the amendment a lottery may not legally be conducted by the city and county.

Respectfully submitted,

JOHN J. O'TOOLE, City Attorney

By _____

DION R. HOLM
Public Utilities Counsel

To:

The Mayor

DRH

April 9, 1947

SUBJECT: FIRE DEPARTMENT AND SALVAGE CORPS, PROMOTIONAL EXAMINATION TO LIEUTENANT IN; SALVAGE CORPS AND FIRE DEPARTMENT, PROMOTIONAL EXAMINATIONS TO LIEUTENANT IN; LIEUTENANT FIRE DEPARTMENT AND SALVAGE CORPS, PROMOTIONAL EXAMINATIONS FOR POSITIONS OF;

Gentlemen:

Certain representations have been made to me concerning my opinion of April 2, 1947, to you on the above entitled matter which deserve consideration. These representations are based on the fact that it is claimed that prior to the enactment of Charter Section 38.1, there was a clear understanding between the representatives of the employees of the Fire Department and the representatives of those in the Underwriters' Fire Patrol who were to be blanketed into the Salvage Corps, that the Corps, when created, would be a distinct unit and operated as such, as far as consonant with good administration. It was intended not only that members of the Fire Department would not be transferred to the Salvage nor vice versa for carrying out duties within respective ranks, but also that promotive examinations within the Fire Department and the Salvage Corps would be open only to the eligible members within the separate divisions.

After serious reconsideration of the language of Section 38.1 of the Charter, I am forced to conclude that if this was the intent it was not completely carried out in the language of the section. It appears that the members as such of the Salvage Corps may not become members of the Fire Department in any manner by examination, transfer or otherwise. The same is true with relation to members of the Fire Department seeking to become members of the Salvage Corps, except that this can be done by examination and certification. The Charter, having expressed an exception in favor of one branch or division, and not having done so with the other, it is necessarily concluded that the exception was intentionally limited to the Fire Department alone.

If this appears to be contra to the intent of the drafters of the Charter amendment, then that intent must be controlled by the express language of the amendment "a statute is a written law and it cannot be construed to have a sense and spirit not deducible from its provisions" (2 Lewis Sutherland Statutory Construction 1085).

This conclusion seems inescapable when the use of the word "transfer" is noted with reference to members of the Fire Department. The term implies a movement from one department to another without termination of one's status as a municipal employee. "Transfers are voluntary matters which are made for the mutual convenience of government and the employee who is being transferred" (Bateman v. Fullen, 28 NYS (2) 230).

Thus the manifested intent of the section is to permit members of the Fire Department to become members of the Salvage Corps upon examination and certification and without terminating their municipal employment.

The Civil Service Commission should, however, give most careful consideration to the language used in the Section in so far as it prohibits members of the Salvage Corps transferring to the Fire Department. Thus, a person who is a member of the Fire Department and who takes an examination for the position of lieutenant in the Salvage Corps is frozen in the Salvage Corps, once he takes his position with that Corps, and he becomes ineligible for further service in the Fire Department.

You are therefore advised that my conclusion is that the opinion rendered you on April 2, 1947, is correct.

Very truly yours,

JOHN J. O'TOOLE
City Attorney

To: The Civil Service Commission

GAH

April 9, 1947.

SUBJECT: CLAIM TO WIDOW'S RETIREMENT ALLOWANCE UNDER SECTION 168 OF THE CHARTER.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"The Retirement Board has directed that the pertinent facts in the case of John J. Walshe, policeman, who died January 23, 1943, be recited to you, and that your opinion be requested relative to the death benefit payable to the widow. The following facts, therefore, are submitted:

"1 - John J. Walshe became a member of the Police Department in January, 1907, and elected to become a member of the San Francisco City and County Employees' Retirement System under Section 168.

"2 - According to the record, John J. Walshe applied for retirement on account of disability claimed to result from an incident on February 27, 1925, when he was struck by a street car, at which time Article VIII, Chapter X, Section 4, of the 1925 Charter was effective and which reads, in part, as follows:

'The Commission shall, out of the Police Relief and Pension Fund, provide as follows for the family of any officer, member or employee who may be killed or injured while in the performance of his duties, and who shall have died within three (3) years from the date of such injury, and the receipt by such officer, member or employee of any relief under this Chapter during his lifetime shall not bar the said family from the benefits of this section.'

"3 - The Retirement Board retired Mr. Walshe effective September 16, 1937 because of disability (continued pain or trouble in the sacroiliac region) resulting from the foregoing injury.

"4 - On January 23, 1943, Mr. Walshe died, the cause of death being recorded as 'cirrhosis of liver.'

"5 - On February 1, 1943, Leona M. Walshe, deceased's wife, filed an application for continuation of retirement allowance.

"You are requested to advise the Retirement Board whether the death benefit is payable to the designated beneficiary, namely, Leona M. Walshe, pursuant to the above facts."

OPINION.

From the facts herein related, it does not appear that Mr. Walshe died within three years from the date of an injury received while in the performance of his duties as a policeman, or even as a result of any such injury.

Under the circumstances, Leona M. Walshe, the decedent's widow, cannot claim any right to any retirement allowance under the provisions of Section 168 of the Charter.

Respectfully submitted,

JNO. J. O'TOOLE
City Attorney.

To: Retirement Board.

NJW

April 10, 1947

SUBJECT: WHAT CONSTITUTES MILITARY SERVICE "IN TIME OF WAR" UNDER SECTION 145 OF THE CHARTER.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"Will you kindly refer to the provisions of section 145 of the Charter dealing with veterans' preferences under which the term 'veteran' is defined as a person who has been mustered into or served in the army, navy or marine corps of the United States in time of war, and who has received an honorable discharge or certificate of active service therefor. Such veterans are required to have thirty days or more of actual service in time of war.

"Under rule of the commission 'time of war' in respect to World War I ran from April 6, 1917, the beginning date of the war, until the Armistice on November 11, 1918. This ruling is based on court decisions which determine that the war ceased with the Armistice, and did not continue until the signing of the treaty of peace.

"Since World War II was not terminated by an Armistice, but by the actual surrender of the Axis Powers, will you advise us if service beyond the surrender of Japan can be construed as service during time of war, or if service beyond December 31, 1946, the date on which the President has declared the cessation of hostilities, can be construed as service during time of war."

O P I N I O N

Section 145 of the Charter defines the term "veteran" as follows:

"***The term 'veteran' as used in this section shall be taken to mean any person who has been mustered into, or served in, the Army, or enlisted in, or served in, the Navy or Marine Corps, of the United States, in time of war and received an honorable discharge or certificate of honorable active service."

As you have indicated in your request, the words "in time of war" have been interpreted, as applied to World War I, to cover the period from April 6, 1917 through the signing of the Armistice on November 11, 1918.

The Supreme Court of the State of California has so held in the case of Kaiser v. Hopkins, 6 Cal. (2d) 537 (1936) where the court said in part:

"When the Armistice was effected on November 11, 1918, the conflict between the United States and Germany--Austria came to an end. All the war activities ceased, never to be renewed. It is true, as argued by plaintiff, that we were technically at war until July 2, 1921, during the time the peace commissioners negotiated the final terms of settlement, but in the minds of the people the war was over...".

In connection with World War II, we have the Presidental Proclamation No. 2714 dated December 31, 1946, proclaiming the cessation of hostilities of World War II in words as follows:

"With God's help this nation and our allies, through sacrifice and devotion, courage and perseverence, wrung final and unconditional surrender from our enemies. Thereafter, we together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

"Now, therefore, I, Harry S. Truman, President of The United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

"In witness whereof, I have hereunto set my hand and caused the seal of the United State of America to be affixed.

Done at the City of Washington this 31st day of December in the year of our Lord Nineteen Hundred and Forty-Six, and of the Independence of the United States of America the one hundred and seventy-first."

In the statement issued by the President in connection therewith we find that the President stated in part as follows:

"I have today issued a proclamation terminating the period of hostilities of World War II as of 12 o'clock noon today, December 31, 1946.

"...This is entirely in keeping with the policies which I have consistently followed, in an effort to bring our economy

and our government back to a peacetime basis as quickly possible.

"The proclamation terminates government powers under some 20 statutes immediately upon its issuance. It terminates government powers under some 33 others at a later date, generally at the end of 6 months from the date of the proclamation. This follows as a result of provisions made by the Congress when the legislation was originally passed. In a few instances the statutes affected by the Proclamation give the government certain powers which in my opinion are desirable in peacetime, or for the remainder of the period of reconversion. In these instances, recommendations will be made to the Congress for additional legislation."

In the minds of the people the war is over. Even the President of the United States in his statement above quoted (other than for technical purposes) refers to the present period as that of, one of "peacetime." And the voters in tying in the term "Veteran" with one who served "in time of war," merely used the words "in time of war" in the ordinary and common acceptation of the term, and no in any technical sense.

This acceptation of the common and ordinary meaning of the words "in time of war", as against any technical interpretation thereof, was adopted by our Supreme Court of the State of California in the case of Kaiser v. Hopkins (supra), in interpreting the same identical words in connection with World War I.

We are adopting that same viewpoint here. Hence, you are advised that service beyond December 31, 1946, the date on which the President has declared the cessation of hostilities, cannot be construed as service "in time of war" under the provisions of Section 145 of the Charter.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission

NSW

April 10, 1947.

SUBJECT: Section 153 of the Charter, as Amended, does not make Retirement System Liable for Injuries Received in any War Service by Employee Granted Military Leave.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"The Retirement Board, at its regular meeting held yesterday February 26, directed that I recite the facts to you in connection with a petition for a monthly allowance to Gertrude A. Newman, as the result of the death of her son, Victor Newman, a fireman. The following statements are submitted:

1. Victor Newman became a member of the Retirement System on September 22, 1936, as an unassigned fireman in the Fire Department.

2. Mr. Newman was granted leave on January 18, 1943, to serve in the United States Merchant Marine as a cook. He was apparently in good health by reason of his acceptance into the Merchant Marine.

3. First record of any heart ailment recorded August 24, 1945 by United States Marine Hospital which reads as follows:

'Brief abstract of patient's statement as to how and when disability was incurred. Patient states in December, 1944, became sick; vomited blood, coughed up blood and uninated blood. Severe pain, couldn't breath and arms hurt terrifically. Hospitalized; bed patent from Dec. 28 to Feb. 6. Shipped home; pains subsided; on May 1, 1945, another attack of pain and coughing.

'Diagnosis. Myocardial infarcation acute (anterior type).

"Number of days completely disabled. April 3, 1945 to August 15, 1945 and continuing for one to two months convalescent leave.'

4. Mr. Newman's leave was abridged October 17, 1945.

5. On reassignment he was classified as an H2 fireman, assigned as hoseman, Engine Company 22, detailed to the Jones Street tank.

6. On March 23, 1946, Mr. Newman died, the immediate cause of death being 'acute coronary occlusion', the autopsy indicating 'said death due to natural causes'.

At the general election on November 5, 1946, proposition No. 6 was approved by the electorate of the City and County of San Francisco, as an amendment to the City and County Charter, known as Section 153, titled 'Leaves of Absence' which was ratified by the State Legislature and became effective January 7, 1947.

Item 1. - Paragraph 5 reads as follows:

'Any officer or employee on military leave, who, prior to such leave, has been appointed to a permanent position in the city and county service, shall be entitled to resume such position at the expiration of his leave, and in determining and fixing rights, seniority, salary and otherwise, which have accrued and shall inure to the benefit of such officer or employee, the term of military leave shall be considered and accounted a part of his service under the City and County.

Item 2. - Paragraph 11 states:

'For the purposes of certification, appointments, leaves or any other matters concerning the rights of persons who are serving or have served in the armed forces of the United States or the State of California, the provisions of this section shall be retroactive to September 16, 1940, and any person heretofore granted military leaves for any purpose other than to enter the armed forces of the United States or the State of California, shall be deemed to have been granted war effort leaves by the Civil Service Commission in accordance with the provisions of this section.'

It is alleged by the counsel representing Mrs. Gertrude A. Newman, that inasmuch as section 153 of the charter reads as above, employees granted military or war leaves are in continual employment of the City and County of San Francisco during these leaves, and therefore under the presumptive section of the Workmen's Compensation provisions that death resulting from a heart ailment in the case of a fireman, may be construed as being incurred in the performance of duty.

The question at issue is that inasmuch as the counsel in this case submits it under section 153 of the charter, is it your opinion that this section applies to the benefit of the applicant?"

OPINION

Somewhat similar to the heart and pneumonia provision of the Workmen's Compensation Law are the provisions of Sections 268 and 269 of Part I of the San Francisco Municipal Code, which provide as follows:

"Sec. 268. Whenever any member of the Police Department or Fire Department shall become incapacitated for the performance of his duty on account of heart trouble or pneumonia which develops or manifests itself while such member is in the service of his department, such heart trouble and such pneumonia shall be presumed to arise out of and in the course of his employment unless there is evidence to the contrary.

"Sec. 269. The provisions of Section 268 shall apply only to members of the Police and Fire Departments, respectively, who shall have served five or more years in one or both of said departments."

I cannot agree with counsel for Mrs. Gertrude A. Newman that Section 153 of the charter, even as amended, effective January 7, 1947, makes the Retirement System liable or responsible for injuries or disabilities received in any war service by employees granted military leaves.

Further, the presumptive provisions of both the Workmen's Compensation Law, and our own Municipal Code, only apply "while such member is in the service of his department" and "unless there is evidence to the contrary". The reference to "service in the

department" undoubtedly means "active" not "constructive" service in the department. Here, it may be assumed that Mr. Newman was in good health when he was accepted by the United States Merchant Marine and sent into the war zone. The first record of any heart ailment was in August, 1945, when he was hospitalized while in the service of the Merchant Marine. It is interesting to note that the record of the United States Marine Hospital shows that Mr. Newman was completely disabled from April 3, 1945 to August 15, 1945, and he was continued thereafter for one or two months' convalescent leave. Immediately thereafter, and on October 17, 1945, Mr. Newman returned to the Fire Department. He died thereafter on March 23, 1946, the immediate cause of death being diagnosed as "acute coronary occlusion", the autopsy indicating "said death due to natural causes". The record in this case would appear to indicate sufficient "evidence to the contrary" to rebut any presumptive provision of the Municipal Code.

And as heretofore indicated, I do not believe that Section 153 of the charter, even as amended effective January 7, 1947, makes the Retirement System liable or responsible for injuries or disabilities received in any war service by employees granted military leaves.

You are thus advised with respect to your inquiry presented.

Respectfully submitted,

CITY ATTORNEY

RETIREMENT BOARD

NSW

April 11, 1947.

SUBJECT: Can Order for Execution to Issue be Obtained more than Five Years after Original Judgment is Entered?

Dear Sir:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"Transmitted herewith is copy of letter dated January 24, 1947 from Robert Ashton Gardiner, 811 25th Street, Sacramento 16, California, regarding the above entitled matter. (Superior Court Case No. 46016 Frank H. Gardiner v. City and County of San Francisco)

The County Clerk's records indicate that the judgment in favor of the plaintiff, in the sum of $1,402.15 and costs without interest, was entered February 13, 1914, Book 69, Page 245.

The case was appealed. According to the Register of Action of the Supreme Court, the appeal was ordered dismissed 'as per stipulation' under date of January 14, 1916.

Your opinion is requested, particularly with respect to the following:

1. Is the instant matter subject to any statute of limitations?

2. If so, what is the effective date of the statute; that is, after what date was the judgment holder barred from bringing further legal action?"

OPINION

Section 336, Code of Civil Procedure, prescribes a limitation for the commencement of actions as follows:

"Within five years:

1. An action upon a judgment or decree of any court of the United States or of any state within the United States. * * * *."

Section 685, Code of Civil Procedure, provides for the enforcement of judgments after the lapse of five years from the date of its entry, as follows:

"(Execution of judgment after five years: Enforcement by judgment on supplemental proceedings.) In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.

Judgment in all cases may also be enforced or carried into execution after the lapse of five years from the date of its entry, by judgment for that purpose founded upon supplemental proceedings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act."

The cases of WELKS v. CONNER, 102 Cal. App. 286, and SAUNDERS v. SIMMS, 183 Cal. 167, are illustrative of our courts' interpretation of these provisions of the Code of Civil Procedure of the State of California.

In the case of WELKS v. CONNER, 102 Cal. App. 286, judgments were recovered in 1913. Nothing further happened until 1927, when an order was obtained from the court for the issuance of a writ of execution. Thereafter an unsuccessful attempt was made to have this order recalled and the writ of execution vacated. On appeal the action of the lower court in issuing the writ of execution was upheld, the court holding that:

> "* * * under Section 685 of the Code of Civil Procedure the mere lapse of time after entry of judgment does not deprive the trial court of the power to order the issuance of execution."

In the case of SAUNDERS v. SIMMS, 183 Cal. 167, the court undertook to construe Section 336, Code of Civil Procedure, and Section 685, Code of Civil Procedure, and in connection therewith held that:

> "Section 685 is a limitation upon the operation of the statute of limitations under Section 336 of the Code of Civil Procedure, to the extent that it places within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute."

In the light of the above provisions of the California Code of Civil Procedure, and their interpretation by our appellate courts, it would appear that even though some thirty-three years have intervened since judgment was rendered in this matter, the court could order the issuance of a writ of execution to enforce this judgment, after due notice is given to the judgment debtor, and provided it is accompanied by an affidavit, which affidavit must set forth the "reasons for failure to proceed in compliance with the provisions of Section 681 of this Code." (Section 681, Code of Civil Procedure, calls for enforcing a judgment within five years of its entry.) Of course, any such execution could only be levied upon such property of a municipality as is not exempt from execution.

The case of C. J. KUBACH CO., v. CITY OF LONG BEACH, 8 C.A. (2d) 567 recognizes the fact that all property held by a municipality is not necessarily exempt from execution. As the court said;

> "City claims in effect that all of the property of a municipality is exempt from execution. There is, however, no such rule in this state. Section 688, Code of Civil Procedure, declares in part: 'All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution . . .' This section does not distinguish between an individual and a municipal corporation. It undoubtedly refers to both ..."

The Supreme Court in denying a hearing in the case of MARIN WATER Etc., CO. v. SAUSALITO, 49 Cal. App. 83 used the following language in referring to what property of a municipality is subject to execution,

and what property is not subject to execution:

> "A city is never other than a public corporation, whether exercising its governmental powers or other powers, in the operation of public utilities, or acting in the quiescent state of a property owner. The fact that it is a public corporation does not determine the question whether or not its property is subject to execution. The true rule is that the property which it holds for the purpose of exercising its governmental powers or for the purpose of exercising its constitutional power to operate waterworks to supply its inhabitants with water or other like public purposes is not subject to execution, the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized. On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, are subject to execution unless some statutory or constitutional provisions forbids it."

Thus it appears that while the court technically has the power to order the issuance of a writ of execution, it cannot do so, and will not do so, unless justifiable reasons are set forth, by affidavit, showing why there was a failure to enforce the judgment within five years of its entry; and even then a levy can only be made upon such property of a municipality, if any there be possessed by a municipality, as is not exempt from execution.

You are thus advised in connection with your inquiries presented.

Respectfully submitted,

CITY ATTORNEY

Controller
NSW

2929

April 15, 1947

SUBJECT: CIVIL SERVICE EMPLOYEES, PROPRIETY OF STATE QUALIFICATIONS FOR MUNICIPAL

Gentlemen:

You have requested my opinion as follows:

> "We have received a letter dated February 28 from the Director, State Department of Public Health, in which he calls attention to the provisions of section 540 to 542 of the State Health and Safety Code, and suggests that in view of the provisions of this code that applicants for positions of Housing and Industrial Inspector, Class N204, be registered Sanitarians, as provided in the State law.
>
> "This would bring the matter of selection of employees of the city and county performing the duties of Housing and Industrial Inspector substantially under control of the State Department of Public Health.
>
> "In view of the provisions of section 8½, Article XI of the Constitution of the State of California, will you advise us if the commission is required to conform to this jurisdiction by the State Department of Public Health."

O P I N I O N

The particular situation referred to represents a continuing trend whereby the state is expanding its control in matters that are primarily of local concern. The amendments of 1914 to Article XI sections 6 and 8½ of the State constitution were enacted to reserve to the chartered city exclusive control over municipal affairs. The state has steadily encroached on this field. Justification for such interference has been made on the ground that when the people of the state as a whole are affected by a particular matter it becomes one of statewide concern. The courts in sustaining the state action have recognized the fact that the municipality may be most immediately interested but the matter is taken out of the field of municipal affairs, and therefore the state's act is paramount. Thus, there is a continuing conflict between the interests of the state in controlling matters of statewide concern and the constitutional right of the municipality to conduct its municipal affairs without interference. No precise definitions of the terms statewide concern or municipal affairs have been established. Indeed, the courts refuse to make any definition, stating that each case will be decided on its own facts, and that these terms represent floating concepts that change with conditions.

The language of section 8½ of Article XI of the constitution can leave little doubt that a civil service system is a municipal affair. This

has been recognized in Dierssen v. Civil Service Com., 43 Cal. App. (2) 53, Villain v. Civil Service Commission, 18 Cal. (2) 851. There are many decisions that refer directly to the conflict of interests between the state and the municipality. Once the existence of a legitimate interest of the state is found to exist, the courts manifest no hesitancy in making it dominant over the municipality even in spite of the above mentioned sections of the constitution. In resolving the conflict in favor of the state, our appellate courts rely on the reasoning that once a matter becomes one of statewide concern, it no longer is a municipal affair. Even when the court feels obliged to protect in some degree the freedom of the municipality, lip service is rendered to the principle, but the same result is reached, namely, that the statute is supreme since it only incidentally affects the municipalities control of its affairs. (See Wilson v. Walters, 19 Cal. (2d) 111, 119; Dept. etc., v. Inyo etc., Co., 16 Cal. (2d) 744; Polk v. Los Angeles, 26 Cal. (2d) 519, 540).

A search of the reports discloses no case where the authority of the state to establish minimum qualifications for municipal civil service employees has been presented. The converse situation arose in In Re Means, 14 Cal. (2d) 254, where the City of Sacramento prosecuted a plumber, a civil service employee of the state, for performing plumbing work on state owned property in that city, without having previously obtained a plumbing license from the municipality as required by ordinance. The court held that the civil service employee did not have to obtain a license from the city. The reasons advanced for the decision are various and rather vague, namely, the field is exclusively and completely occupied by the state, that the ordinance did not expressly apply to the state, and most important apparently, that it did not seem fit for the sovereign to be subject to a subordinate government. Whatever the reasoning of the court, it is not believed that this decision would offer you any support should you decide to resist the imposition of state qualifications. Though not precisely in point, the reasoning contained, and the results reached in Horwith v. Fresno, 74 A.C.A., 483 indicate the trend of judicial acquiescense to the enlargement of state activities. In that case the state had established a system for examining and licensing electrical contractor. The City of Fresno required that electrical contractors be licensed by the municipality before doing work within the city limits. The court held that the state had occupied the field in a matter of statewide concern and therefore the local ordinance was inoperative and the contractor was qualified to work within the limits of that city by reason of this state license alone.

The question of sanitation was considered in Pixley v. Saunders, 168 Cal. 152. It was held that although there were many local aspects to the problem, it was also one of statewide interest. The field of public health generally tends to extend beyond the scope of municipal affairs, and becomes one of wider concern (See Stat. 1945 Ch. 1408; Pixley v. Saunders, supra).

Strong arguments can be advanced supporting the position that the employment of qualified sanitarians to inspect and enforce the health laws is a matter of state interest. If this is so, then it would appear that the state may impose minimum qualifications as a prerequisite for employment within this field, even though such qualifications do in a sense restrict the municipality's freedom of operation within the province of municipal affairs.

This same problem previously arose with reference to the employment of milk inspectors. For the reasons set forth in my opinion of September 18, 1944, (a copy of which is enclosed) since this matter appears to be one of statewide concern, the statute controls over the charter. (vid. Pasadena v. Charleville, 215 Cal. 384, discussing the distinctions).

It is my conclusion, that although the conduct of a civil service system is a municipal affair, that the matter of public health is of statewide concern, and that the state's act in requiring civil service employees to become registered sanitarians under the Health and Safety Code would be upheld by the courts.

Respectfully submitted,

CITY ATTORNEY

To: Civil Service Commission
GAH

3140

April 16, 1947

SUBJECT: ZONING LAW APPLIES TO CITY PROPERTY LEASED TO A PRIVATE PARTY FOR A COMMERCIAL USE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"I am writing to request an opinion on the following question: Do the provisions of the zoning ordinance apply to property under the jurisdiction of the Department of Real Estate, which the Department of Real Estate proposes to lease to a private party for development for a commercial use?

"The following case illustrates the question: the Department of Real Estate has under its jurisdiction the property in the vicinity of the Laguna Honda reservoir on the southeast corner of 7th Avenue and Clarendon Avenue. At the present time this property, because it is in public ownership, does not have a Use District classification. If the Department of Real Estate desired to lease the property to a private company for development as a gas station i.e., Commerical Use, would it be necessary for an application for rezoning to be made to the City Planning Commission?"

O P I N I O N

The city as the owner of property used for a proprietary use is in no different status than any private owner of property would be, insofar as compliance with the zoning law is concerned in a case such as this one. (See opinion of December 5, 1932).

You are therefore advised that the zoning laws do apply to property owned by the city which it proposes to lease to a private party for development for a commercial use.

Respectfully submitted,

CITY ATTORNEY

To: Director of Planning
City Planning Commission

NSW

April 17, 1947

SUBJECT: TRANSPORTATION COUNCIL, AUTHORITY OF MAYOR TO APPOINT. CAN SUPERVISORS DO SO? IS APPOINTMENT A LEGISLATIVE OR AN EXECUTIVE ACT?

Dear Sir:

You have requested an opinion as follows:

"1. Was the creation of the Transportation Council and the rules governing its operation a legislative or an executive act?

"2. Is the creation of a Transportation Council a violation of the Charter?

"3. Can the Transportation Council be created by an ordinance or resolution of the Board of Supervisors? If the answer to this question is 'yes', does it not necessarily follow that the creation of the Council was legislative rather than executive or administrative?"

O P I N I O N

A proper answer to your questions requires a preliminary statement relating to the structure of the government of the City and County. Reference is made first to Section 25 of the Charter relating to the powers and duties of the Mayor.

The Mayor is the chief executive officer of the City and County. He is responsible for the enforcement of all laws relating to the municipality. It is his duty to review as chief executive, the annual budget, consolidated by the Controller from the several budgets of departmental executives, and to submit the budget after his review to the Board of Supervisors.

The Mayor is required not only to supervise the administration of departments under him, but to "coordinate and enforce cooperation between all departments of the city and county".

The Mayor also has legislative responsibilities. As chief executive officer, he is not only required to "communicate by message to the Supervisors a general statement of the condition of the affairs of the City and County", but he is also required to recommend as to these affairs "the adoption of such measures as he may deem expedient and proper".

In conformity with these duties, the Mayor, in his annual message of last January, discussed the condition of public transportation in the City and County. He stated that, in order to be able to make the best recommendations for action on the subject, he had coordinated and enforced cooperation of the best experts of the City and County in the field of transportation. This he did by appointment of an "Administrative Transportation Planning Council", composed of the Public Utilities Commission, the City Planning Commission, the Police Commission and the Chief Administrative Officer. He made available for the purpose of transportation planning the expert heads of these departments and their staffs and directed also that the Controller be consulted as needed on related fiscal matters.

This committee has now reported in substantial part to the Mayor on traffic, transit and thoroughfare improvements for San Francisco. The Mayor has approved that report and has recommended to the Board of Supervisors the adoption of the measures there proposed.

The Mayor has thus endeavored to fulfill the earlier promise of his annual message, given by him in conformity with his duty as prescribed by the Charter. He has done this by enforcing cooperation of departments in conformity with the mandate of the Charter given to him in that regard. The duties of the Transportation Council are those of study and expert advice to the Mayor in relation to a matter within his duties as mayor.

1. The creation of the Transportation Council by the Mayor and the rules governing it is thus seen clearly to be an executive act of the Mayor fully authorized by Section 25 of the Charter.

2. The creation of the Council by the Mayor is not a violation of the Charter, but is entirely in conformity w th it.

3. With reference to your third question, whether the Board of Supervisors might appoint the Transportation Council, I answer in the affirmative. Nothing which has been said suggests a limitation upon the powers of the Board of Supervisors to plan, study and legislate for civic betterment and improved conditions in municipal affairs.

The Board may not coordinate departments in an executive way as may the Mayor. Any committee appointed by the Board would be voluntary. As stated in Section 9 of the Charter, however, "The Board of Supervisors may, by ordinance, confer on any officer, board or commission such other and additional powers as the Board may deem advisable". Appointment of a voluntary committee by resolution would be administrative. Action as indicated by Section 9 would be legislative. This would be so in either case although the ultimate objective might be legislation.

Recommendation of legislation by the chief executive after counsel with subordinate executive officials is not only generally authorized governmental procedure but is also strictly in conformity with the Charter of San Francisco.

Respectfully submitted,

CITY ATTORNEY.

To: Board of Supervisors

cc: Office of the Mayor

WP

April 22, 1967

SUBJECT: LEGISLATIVE REPRESENTATIVE, BY WHOM MAY HE BE ADVISED OR DIRECTED.

Gentlemen:

You have requested an opinion as follows:

"By whom should the Legislative Representative be advised with regard to legislation affecting the city and County of San Francisco, while he is at the State Legislature? Should it be by the Board of Supervisors upon consideration of the legislation by the County, State and National Affairs Committee of the Board; or should the Mayor so advise the Legislative Representative?"

O P I N I O N

Resolution No. 4264 (Series of 1939), approved October 12, 1944, pursuant to which our Legislative Representative was engaged, states as follows:

"RESOLVED, That this Board of Supervisors does hereby delegate to his Honor, the Mayor, authority to appoint, on a full-time basis, a legislative representative for the City and County of San Francisco, the appointment of such representative to be subject to ratification by the Board of Supervisors and that the various policies and programs proposed by the Mayor for execution by such legislative representative shall be subject to approval by the Board of Supervisors."

In accordance with this resolution, direction may be given to the Legislative Representative by statement of policy or program proposed by the Mayor and approved by the Board of Supervisors.

Direction to the Legislative Representative of the City and County in regard to legislation affecting it may also be given, however, by resolution of the Board of Supervisors. This is true by virtue of the provisions of Sections 9 and 13 of the Charter, relating to the power and procedure of the Board of Supervisors.

The right to give "advice", the word used in your question, as distinguished from direction, is, of course, a constitutional one of every citizen.

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." State Constitution, Article I, Section 9.

Advice may well be confused with direction, however, when given by those entitled to direct. Orderly and effective procedure would seem therefore to require that advice to the Representative by those entitled to direct him be given by one of the methods authorized for direction, as stated above.

Respectfully submitted,

CITY ATTORNEY.

To: County, State and National Affairs Committee, Board of Supervisors.

cc: Office of the Mayor.

WP

2145

April 22, 1947

SUBJECT: USE BY PRIVATE ORGANIZATIONS OF PROPERTIES OPERATED BY THE PARK COMMISSION UNDER SECTION 41 OF THE CHARTER.

Dear Sirs:

Under date of April 16, 1947 this office received the following request:

"I have been directed to state the following facts and request an opinion from you:

"The San Francisco Convention and Tourist Bureau, now confronted with the loss of the Opera House and Veterans' Building for the larger exhibiting conventions, has requested this Commission for permission to offer the Civic Center Plaza, except for the portion in trees, lawns and shrubbery, to associations for an open air, or canvas pergola, or tent-covered exhibits.

"Each of these exhibits, whether under open air, under the canvas pergola or tent-covered, will last approximately five days and would number five or six a year.

"The canvas pergola type of exhibit would require a low garden type of structure supported by steel pipe under canvas expressly made to cover the center brick patio over the fountain and so designed to be harmonious with the trees and greenery of that area. Needless to say, the structure would be custom made and suitable only for use in Civic Center Plaza.

"The tent covered exhibit would require a large circus tent which would cover a greater portion of the plaza.

"In both of these plans the Convention and Tourist Bureau has proposed to work out some financial arrangement with the contractors or manufacturers of this pergola or tent, so as to reimburse them for the initial costs from the financial returns of these conventions.

"The possibility of the City and County of San Francisco paying out the initial cost of the pergola or tent has also been proposed.

"In view of Section 41 of the Charter of the City and County of San Francisco, has the Park Commission the legal right to offer the use of properties under its jurisdiction for purposes as outline hereinabove?"

O P I N I O N

It is the opinion of this office that the Park Commission is without authority under Section 41 of the Charter to offer the use of the Civic Center Plaza or any part thereof for the purpose described in your request. This opinion is based not only upon a perusal of the Charter section involved but upon the previous opinion rendered by the City Attorney on August 10, 1945 in which the following cases were cited:

Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615 at page 625:

"It may be said that the Board of Park Commissioners is entrusted by the City Charter with the management and control of the park property....However, this Charter provision confers no authority upon the Board of Park Commissioners to destroy the subject of the trust or to devote it to use other than that of enjoyment and recreation. Its authority is merely that of a trustee invested with limited jurisdiction, having imposed upon it the duty to protect parks within its management and control, which should at the same time compel such board to protect, rather than instigate usurpation of authority over parks of the city by another body, or pass its trust property into the street department."

To like effect were the following decisions:

Mulvey v. Park Commission of the City of San Diego, 23 Cal. App. 269;

McCullough v. Bd. of Education, 51 Cal. 419;

Kelly v. Town of Hayward, 192 Cal. 242;

Powell v. Walla Walla, 64 Washington 502 (117 Pac. 298

Opinion of City Attorney of San Francisco dated December 6, 1933, in re Use of Park Lands for Street Purposes.

However, if a particular proposal for the use of the Civic Center Plaza appeals to the Park Commission as one designed solely for recreational purposes, the use of the Plaza might, in such case, and for a limited period of time, be left to the Commission's discretion.

Respectfully submitted,

CITY ATTORNEY

TO: Park Commissioners

MDP

April 23, 1947.

SUBJECT: Disposition of Members' Accumulated Contributions Based on More than Thirty-six Years of Service.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"Our request of December 16, 1946, and your opinion of February 4, 1947, referred to the maximum years of service which could be used in the calculation of benefits under section 165.2 of the Charter, becoming operative July 1, 1947. In the consideration of the question, the service to be used was associated with contributions to be made under the section by members and the City and County. The question was directed more to the status of persons who will complete thirty-six years of service after July 1, 1947, and your opinion was that a maximum of thirty-six years could be used in calculating benefits.

"A question now has arisen with reference to accumulated contributions of persons who will have completed more than thirty-six years of service when the charter section becomes operative on July 1. These persons will have contributed at lower rates under the present law, for a maximum of twenty-five years and three months of service as members of the Retirement System which became effective April 1, 1922. The balance of their more than thirty-six years of service is classified in the retirement law, as 'prior service', and the benefits based on it are paid from contributions made by the employer.

"The question at issue involves the disposition of contributions with accumulated interest, made prior to July 1, 1947, on the basis of service rendered after the completion of thirty-six years of service.

"You are requested to advise the Retirement Board as to the lawful disposition of that portion of accumulated contributions, which is based on service rendered after the completion of thirty-six years of service and which will be standing to the credit of persons who become members of the System on July 1, 1947, under section 165.2.

"Subject to the interpretation of the Section, there apparently are three possible methods of handling such accumulated contributions, as follows:

"1 - Refund to the member, said portion of his accumulated contributions.

"2 - Credit to the member as additional contributions, said portion of his accumulated contributions. The additional accumulated contributions would be applied to provide a benefit over and above the normal benefit under the section.

"3 - Retain to the credit of the member's normal accumulated contribution account, said portion of his accumulated contributions, and apply it, together with the balance of his accumulated contributions, to provide part of the normal benefit under the section, this normal benefit to be based on maximum service of thirty-six years, or since the contributions already will have been made, on all service rendered prior to July 1, 1947."

OPINION

I do not believe that the accumulated contributions, as referred to in your request, can be disposed of in the manner indicated by your first two suggestions, but rather must be handled in the method indicated by your third suggestion, for the reasons as hereinafter stated.

Subsection (1) and (3) of subdivision H of section 165.2 of the Charter provides in part as follows:

"(H) All payments under this section shall be made from funds derived from the following sources, plus interest earned on said funds:

"(1) * * * * Provided further that the member's contribution under this section and the city's contribution on his account shall cease after thirty-six years of credited service * * * *.

"(3) Contributions based on time included in paragraphs (1) and (3) of subsection (G), and deducted prior to the effective date hereof, from compensation of persons who become members under this section, and standing with interest thereon, to the credit of such members on the records of the retirement system on said date, shall continue to be credited to the individual accounts of said

members and shall be combined with and administered in the same manner as the contributions deducted after said date."

As you have indicated in your request, we have already advised you, in an opinion dated February 4, 1947, that no more than thirty-six years of service may be taken into account in calculating the benefits under section 165.2 of the Charter but, as you also pointed out, that opinion was directed to the status of persons who will complete thirty-six years of service after July 1, 1947, and who therefore will have contributed only on thirty-six years of service.

You now ask what disposition is to be made of that portion of the accumulated contributions of those persons who become members under 165.2 of the Charter on July 1, 1947 which is based on service rendered after the completion of thirty-six years of service, and which is already credited to such persons on July 1, 1947.

Subsection (3) of subdivision H of 165.2 of the Charter provides in effect that contributions deducted prior to July 1, 1947 from the compensation of persons who become members under this section of the Charter, together with the interest thereon, standing to the credit of such members on the records of the Retirement System on July 1, 1947, shall "continue to be credited to the individual accounts of said members and shall be combined with and administered in the same manner as the contributions deducted after said date."

Under the above quoted language of subsection (3) of subdivision H of 165.2 of the Charter, I am of the opinion that the accumulated contributions of members in excess of thirty-six years of service, at the time of the effective date of 165.2 of the Charter on July 1, 1947, shall be retained in the Retirement Fund and remain to the credit of the member's normal accumulated contribution account, to provide part of the normal benefit under this section--this normal benefit in such case to be based on all service rendered prior to July 1, 1947.

You are thus advised in connection with your inquiry as presented.

Respectfully submitted,

To:

CITY ATTORNEY

Retirement Board

NSW

April 24, 1947

SUBJECT: DISPOSITION OF ESTATES IN COUNTY TREASURIES FOR FIVE YEARS

Gentlemen:

I have your request for an opinion as follows:

"Enclosed is copy of a letter received from the U. S. Treasury Department Fiscal Service, also copy of my reply to same.

(Copy of enclosure)

"This is in connection with the disposition of two $25 savings bonds of Series E inscribed 'Mr. Charles Nelson, 1011 Howard Street, San Francisco, California.' The bonds were sent to us by the Chief, United States Secret Service in Washington, D. C.

"It appears that the deceased registered owner was found dead in his room in the Raymond Hotel in San Francisco in July of 1945. As no record of any relatives of Mr. Nelson could be found nor any assets of his located at that time, he was buried at the expense of the City of San Francisco.

"In view of the circumstances, it appears that the bonds should be turned over to you for appropriate disposition in accordance with Section 1274(c) of the Code of Civil Procedure of California.

"Please let us know the address to which the bonds should be sent."

"I have now received from the U. S. Treasury Department Fiscal Service, the said bonds. They are as follows:

"One U. S. of America Defense Savings Bond Series E issue July 1942 in the amount of $25.00, No. Q22713277E, registered in the name of Mr. Charles Nelson, 1011 Howard Street, San Francisco, California.

"One U. S. of America War Savings Bond Series E issue July 1944 in the amount of $25.00 No. Q44497050 3E, registered in the name of Mr. Charles Nelson, 1011 Howard Street, San Francisco, California.

"I wish you would advise me as to what disposition I should make of said bonds."

O P I N I O N

The full procedure for handling the matter referred to in your request is set forth in Section 1274c of the Code of Civil Procedure and I quote from that section as follows:

...

"...the county treasurer shall within one year following the expiration of five years from the date of such deposit file a petition in the superior court of the county in which the deposit is held, setting forth the fact that the money or other personal property has remained in the county treasury under such circumstances for the five year period and petitioning the court for an order directing him to pay the money or other personal property into the state treasury as provided in this section.

"At the time of the next county settlement following the date of the making of the order by the court, unless earlier payment is required by the State Controller, the county treasurer shall deliver the money deposits covered by the order to the State Treasurer and all other personal property to the State Controller, for deposit in the State treasury.

"At the time of the county settlement, the county treasurer shall deliver to the State Controller a certified copy of the court order in connection with each state included in the county settlement pursuant to the provisions of this section ....."

I therefore advise you to follow the statute as set forth above in handling the bonds on deposit with you and referred to in your request.

Respectfully submitted,

CITY ATTORNEY

To: Office of the Treasurer
City and County of San Francisco

BJW

2746

April 25, 1947.

SUBJECT: [illegible] LISTS, [illegible] TO SENIORITY IN POSITIONS AND PROMOTIONAL EXAMINATIONS.

Gentlemen:

I have your request for an opinion as follows:

"We desire your advice regarding the effect of certain provisions of Charter Amendments Nos. 6 and 12 ratified on January 7, 1947.

"As you know, section 153 of the charter has been amended several times in the past four years and some of the specific items concerning which we desire your advice will be determined by your interpretation of the retroactive effect of these various successive amendments to section 153 of the charter. The first amendment to section 153 of the charter to which we direct your attention is that amendment which was effective upon ratification by the Legislature on January 11, 1943; the next amendment to section 153 was ratified by the Legislature on June 9, 1944; and the current provision was ratified on January 7, 1947.

"Please note that section 153 as amended on June 9, 1944 provides that if the name of an eligible (not an employee) was reached for appointment to a position in the municipal service during the period of military duty of the eligible, such eligible shall be certified to his position upon his return from military duty, and that for the purpose of determining lay-off the date of certification to such position shall be deemed to be the date when the name of such eligible was reached for certification. The provisions of section 153 effective January 11, 1943 which continued in force until June 9, 1944, contained no such retrospective provision. However, section 153 as amended on January 7, 1947 provides that in such cases eligibles on military leave, upon return from military duty shall be certified to the positions for which their names were reached, and that the dates their names were reached for appointment shall determine their seniority in the municipal service for all purposes.

"We call your attention further to the next to last paragraph of section 153 as amended January 7, 1947, which provides that for purposes of certifications, appointments, leaves, or any other matters concerning the rights of persons who are serving or have served in the armed forces, the provisions of this section shall be retroactive to September 16, 1940. In connection with this paragraph it should be noted that the entire

paragraph was intended to differentiate between the status of persons who had been granted military leaves of absence for military duty and those persons previously granted 'military leave' for the purpose of entering employment in war industries. The language of this paragraph is substantially the same as the language in the section as it read effective between June 9, 1944 and January 7, 1947.

"Our questions follow:

"1. Let us assume the case of an eligible whose name was reached for appointment to a position in the municipal service in December 1944 and who was discharged from military service and was certified and first assumed the duties of his position on January 1, 1946. In accordance with the provisions of section 153 at the time of his appointment he was given seniority for lay-off purposes only as of December 1944 when his name was reached. However, for all other purposes his seniority date was January 1, 1946. He was accordingly appointed at the entrance rate of pay. On January 7, 1947 the current provisions of section 153 granting seniority for all purposes became effective and we have approved an adjustment in pay, effective January 7, 1947 to reflect service back to the date the name of the eligible was reached for appointment.

"(a) Is this employee entitled to retroactive pay adjustments for the period January 1, 1946 to January 7, 1947, which adjustment would include credits for service to date of actual assumption of duties from the time his name was reached for appointment in December 1944.

"2. Assuming the same date of appointment, assumption of duties, and date that the name of the eligible was reached for appointment while on military duty, the employee had completed one year of actual service in the municipal government on January 1, 1947 and therefore at that time had credited to him two weeks of sick leave. (Under the provisions of section 153 as then effective he was not entitled to sick leave with pay until after one year of actual service). The employee was absent from duty by reason of illness in December 1946, before he had completed the year of service, and he was not paid for this absence. On January 7, 1947, the present charter amendment (providing that the date his name was reached for appointment shall determine his seniority for all purposes) became effective and we thereupon credit him with sick leave privileges based on the December 1944 date on which his name was reached for appointment.

"(a) Are such sick leave with pay credits which accrue on January 7, 1947, applicable only on subsequent absences due to illness, or may these credits be applied to absences due to illnesses prior to the effective date of the current provision?

"3. Assume the case of an eligible who entered the military service and was discharged therefrom and assumed his municipal employment prior to June 9, 1944. In accord with the provisions of section 153 then effective, this man was appointed as of the date he actually assumed his duties with seniority as of that date. The transaction was complete and final prior to the ratification to the amendment of section 153 on June 9, 1944. Had he returned from military duty and been appointed to his municipal position between June 9, 1944 and January 7, 1947, he would have been appointed with seniority for lay-off purposes only as of the date his name was actually reached for appointment. Had this eligible returned subsequent to January 7, 1947, he would have been granted seniority for all purposes as of the date his name was reached for appointment.

"(a) Can such an employee now claim the benefits of the section as it was amended on June 9, 1944 subsequent to his actual appointment, or the more liberal benefits of the section as it was amended on January 7, 1947?

"4. This situation deals with the right of an employee on duly authorized military leave of absence whose name appears on a list of eligibles for promotion. During his term of military service his name was reached for appointment to the promotional position and upon his return he was appointed to the promotive position and assumed the duties thereof. Prior to January 7, 1947 the commission announced a promotional examination from the promotive rank to which the employee was appointed. The employee participated in this promotive examination and qualified as an eligible. The second promotional examination was announced and completed, including the adoption of the list before January 7, 1947. Under the circumstances and in accordance with the provisions of section 153 of the charter as in effect at the time, the commission credited seniority of service for this employee in this second promotional examination from the date he was appointed and assumed the duties of the lower promotive class from which he was competing for further promotion, rather than the date that his name was reached for appointment while in the military service. Had the examination been announced, conducted and completed subsequent to January 7, 1947, the commission would have credited this employee with seniority of service from the date his name was reached while in the military service.

"(a) Is this employee now entitled to re-rating of an examination completed under the terms of the previous charter provisions so as to credit him with service to which he would have been entitled had the examination been conducted under the terms of the present charter provisions?

"We now direct your attention to the provisions of charter amendment No. 12 which adds section 146.1 to the charter and which provides that employees under a permanent civil service appointment who were on duly authorized military leaves, and because of absence on military duty did not participate in a promotional examination held during their absence on military duty shall have the right to participate in a substitute or similar promotional examination. Please note that this section grants such privileges only to employees of the municipal service who were absent on duly authorized military leave, and does not extend to persons on eligible lists who were not employees of the city and county.

"1. Let us assume the case of an eligible whose name was reached for appointment in 1942 and who was discharged from military duty and was certified and assumed his position in January 1946. Between 1942 when his name was reached for appointment in the lower class and the time he actually assumed his position in 1946, a promotional examination was held which was open to persons in the classification to which this eligible was subsequently appointed. He was not an employee of the city and county on military leave at the time the promotional examination was held, but he contends now that had he not been on military service he would have accepted the appointment when his name was reached in 1942, and in that event he would have been an employee of the city and county in the classification from which the promotion was made, and he now claims the right to take a substitute or similar promotional examination.

"(a) Do the provisions of section 146.1 confer the privileges contained therein on an eligible or only on bona fide employees of the City and County of San Francisco?

"(b) Reading this new section 146.1 in connection with the provisions of section 153 as amended January 7, 1947, can such an eligible claim status as an employee under section 153 from the date his name was reached for appointment and thereby obtain the benefits of section 146.1 retrospectively?

"2. An employee under permanent civil service appointment but absent on duly authorized military leave did not participate in a promotional examination held during his absence. He is entitled

to the benefits of section 146.1 of the charter and will be given the opportunity to qualify for the promotional appointment which he missed during his military service through a substitute examination in accordance with the terms of section 146.1 of the charter. Let us assume that the employee in question held a position as policeman and that during his absence we held examinations for promotion from the rank of policeman to the rank of sergeant for which he was eligible to compete, and at the same time a promotional examination from the rank of sergeant to the rank of lieutenant:

"(a) If the employee is successful in passing the substitute examination for promotion to the rank of sergeant, is he then entitled to claim the right of a substitute examination from the rank of sergeant to the rank of lieutenant which was held at the same time as the sergeants?

"(b) Assuming that the examination for promotion from sergeant to lieutenant was held not concurrently with the examination for promotion from policeman to sergeant, but a year or two years later, is the employee, under these circumstances, entitled to a substitute examination from the rank of sergeant to lieutenant?

"We are quite concerned about some of the claims for retrospective benefits because if these are legal claims, appointments heretofore made on the basis of existing charter provisions will be disturbed or affected, or perhaps nullified. We have considered that transactions completed under former charter provisions then in effect are final. We realize that these problems are very complicated and we shall be glad to discuss them in more detail with any of your staff. We have already talked to Mr. Ward about most of the matters mentioned herein. We shall appreciate your prompt attention."

O P I N I O N.

Before covering the problems presented in your request, I will discuss the recent amendment to section 153 of the charter broadly, leaving out, for the present, any reference to the amendment to the charter which added section 146.1.

The general rule in California is that it is not objection-

able to the validity of a statute to say that it is retroactive in its operation, except where the effect of such retroactive feature would constitute a gift of public funds to an individual or individuals for services rendered at a time when no legal duty was owing to that individual.

The questions presented here regarding section 153, as amended in the November 1946 election, are: Does the section as amended give it a retroactive feature? And, secondly, does the reading and interpretation of this section require that it be applied retroactively in all particulars?

A study of the history of this section of the charter indicates that all of the amendments to section 153, which have been referred to in your request, clearly show an intention upon the voters of the City and County of San Francisco to insure to the employees and eligibles who served in the armed forces the same relative positions as those who remained in jobs throughout the war years. Seniority and credit for city and county service are integral parts of an employees' rights in the service of the City and County of San Francisco.

A careful analysis of the history of this section covering the retroactive feature is significant as proof of the intention of the people of San Francisco to grant to the returning veterans the same conditions of employment they had or would have had if the war had not intervened. In the section, as it read prior to the amendment of June 9, 1944, appeared the following language:

> ***"Military leaves granted to officers, employees, or eligibles for service on ships operated by or for the United states government shall be retroactive to December 7, 1941." ***

With the amendment ratified by the Legislature on June 9, 1944, the above language no longer appears in the section and the following is substituted for it:

> "For the purposes of certifications, appointments, leaves or any other matters concerning the rights of persons who are serving in the armed forces of the United States or the State of California, the provisions of this section shall be retroactive to September 16, 1940, and any persons heretofore granted military leaves for any purpose other than to enter the armed forces of the United States shall be deemed to have been granted war effort leaves by the civil service commission in accordance with the provisions of this section."

In its present form, effective as of January 7, 1947, this paragraph, with a few minor changes, is again re-enacted. The only significant change being that after the words "who are serving" is inserted the additional phrase "or have served", clearly indicating that it was the voters' intention to give the veterans who had already returned to the city service, the same privileges as those who would return subsequent to the adoption of this charter amendment.

With this general observation I will now approach the individual problems presented in your request. Inasmuch as the first two questions, which you have numbered 1a and 2a, concern the rights of employees to receive retroactive pay for services rendered and completed prior to the enactment of the January 7, 1947, amendment to section 153, I am treating them in this opinion as identical and have answered them as one question.

From a reading of the request it is quite apparent that what you are asking is: Can an employee now be paid an additional sum of money for service already rendered and completed, over and above the amount provided for his service in the budget at the time the service was rendered? There is no doubt that such payment would be in the nature of a gift of public funds and beyond the powers of the city. This fundamental principle is embodied in Article IV, Section 32 of the Constitution of the State of California which reads as follows:

> "The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra-compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

The Appellate Court in the case of <u>Lamb v. Board of Peace Officers</u>, 29 Cal. App. (2d) 348, had this section before it for construction. In that case a police officer was injured while performing his functions as a police officer, but under the law, as it then read, he was not entitled to a disability pension. Subsequently, the law was changed and the change contained within it a retroactive feature, and the police officer sought to invoke the retroactive feature and secure for himself a disability pension under the newly enacted law. At page 350 the court stated:

"A pension is a gratuity when it is granted for services previously rendered and which at the time they were rendered gave rise to no legal obligation. (O'Dea v. Cook, 176 Cal. 659, 661 (169 Pac. 366). The law is settled that the legislature has no power to make any gift or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation (sec. 31, Art. IV, Const. of the State of California), nor does the legislature have power to grant or authorize any court or municipal authority to grant any extra compensation or allowance to any public officer after services have been rendered by him."

The facts in the case cited are almost identical with the questions presented under 1a and 2a inasmuch as at the time the service of the persons concerned in questions 1a and 2a was rendered there was no legal obligation to pay them anything other than the sum they were paid under the law as it read at the time.

This amendment to section 153 of the charter falls clearly within the prohibitions of Article IV, Section 32, inasmuch as Article XI, Section 8 provides that amendments to charters must be approved by the legislature, and as was said in the case of Lamb v. Board of Peace Officers, supra, at page 350:

" . . . Therefore, since it is a gratuity the legislature was without authority to adopt the portion . . which attempted to make the provisions of the Pension Act retroactive, for the reason that Sections 31 and 32 of Article IV of the Constitution of the State of California . . . denied to the legislature the authority to grant or authorize any subdivision of the state to grant an annuity gift or extra compensation to any public officer for service previously rendered."

Therefore, you are advised:

1a. That no lump sum payments may be made to any employees for services rendered prior to January 7, 1947, based upon the retroactive feature of section 153 as amended on that date.

2.a. That no employee, serving less than one year, may be paid any sum of money for sick leave taken during his first year of service for the city and county, if such sick leave was taken without pay. Such sick leave credits are only applicable to subsequent sick leave absences.

3a. The employee may claim all of the rights to which he is entitled under the more liberal terms of section 153 as it now reads, inasmuch as the amendment to the retroactive part of the section now reads "or have served." The voters of San Francisco approved the present section making all of its provisions as regards the certification, appointment and all other matters relating to the rights of employees retroactive. The intent of the language is plain and must be given its full force and effect.

4a. Any employee who has previously completed any examination under the provisions of section 153 of the charter, as it existed previous to the present amendment, is entitled to be re-rated in accordance with the retroactive features of section 153 as it now stands. The plain intent and purpose of this latest amendment is to give the returning veteran exactly what he would have had if he had not been summoned into the service of his country. Again we look at section 153 and find that it reads, in part:

> " . . . For the purposes of certifications, appointments, leaves or any other matters concerning the rights of persons who are serving <u>or have served</u> in the armed forces of the United States or the State of California, the provisions of this section shall be retroactive to September 16, 1940 . . ."
> (Italics ours).

It appears very evident that the right to this re-rating is one of the "matters concerning the rights of persons" referred to in section 153. Accordingly, the returning veteran should be given credit for all the time he was in the service subsequent to the date that he was reached for certification, and such credit should be considered as seniority in service.

I will now consider the second portion of your request regarding the rights of persons returning from military leave "to take similar promotional examinations." The pertinent and controlling language is found in the first sentence thereof "<u>employees under permanent civil service appointment, who because of absence on duly authorized military leave did not participate in a promotional examination held between September 16, 1940, and the effective date of this amendment</u> . . ." This confines the rights arising under this section solely to employees who have a permanent civil service appointment and who were absent on duly authorized military leave. This section, 140.1, like the amendment to section 153, has for its purpose the reestablishing of the rights and positions of all city employees who have been on military leave. Accordingly, with this preliminary statement, I shall discuss the questions asked in the second part of your request.

1a. The privileges do not apply to any eligible since it specifically mentions "employees under permanent civil service appointment,"which contemplates not only certification, but also appointment, and one on an eligible list does not meet this second requirement of appointment.

1b. There is nothing in section 153, as amended, that can be read so as to construe an eligible as an "employee under permanent civil service appointment," and thus give this eligible the advantages of the provisions of section 146.1. While section 153 specifically provides that the seniority for all purposes dates from the day that a person is reached for certification, it also provides that "each appointee to a position shall serve such probationary period as is required in section 148 of this charter." This language clearly indicates the fact that section 153 recognizes that no eligible who is on military leave has a permanent appointment unless he serves a probationary period after his appointment, as provided in section 148 of the charter. No eligible may claim status as an employee until he has completed the requirements provided for in section 148 of the charter, and unless such eligible has so complied, he may not claim the right to take a similar promotional examination as provided for in section 146.1.

2a. This question presents almost the identical problem referred to above, since again we are dealing with eligibles. The highest status that the employee, as presented in your problem, could possess is:

(1) A permanent civil service employee as a policeman.

(2) An eligible on a list for appointment as sergeant.

Section 148 of the charter provides "that all promotions in the uniformed forces of the police and fire departments, respectively, shall be made from the next lower civil service rank obtained by examination." The employee seeking to take the similar promotional examination for lieutenant would not meet the requirements set forth in the first sentence of section 146.1, towit:"employees under permanent civil service appointment." This section would require the employee to be appointed to a permanent position as a sergeant,or to be at least serving in a probationary status at such time as he was eligible to take the similar promotional examination for lieutenant.

2b. The fact that the examinations for sergeant and lieutenant were not held concurrently would not change the answer to "a" above. For again the same test must be met, was he an "employee under permanent civil service appointment" and because

of his absence on duly authorized military leave did not participate in a promotional examination. The employee must meet both of these conditions to demand a "similar promotional examination."

Though the last part of this opinion may seem harsh in some cases, the charter must be construed in its entirety. This new section, 146.1, only covers persons having permanent appointments in their classification. While it may be true that certain eligibles have lost rights because they were in the military service, I can only read the plain, unambiguous language of the charter, and in the absence of any doubt as to its meaning I must give full force and effect to it as written.

Respectfully submitted,

JNO. J. O'TOOLE,
City Attorney.

To: Civil Service Commission.
c. c. S. F. Retirement System.
c. c. Harry D. Ross, Controller.
BJW Jr

2147

April 25, 1947

SUBJECT: MEASUREMENT OF MINIMUM REAR YARD DEPTH REQUIRED UNDER ORDINANCE NO. 4162

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

> "An application for a variance from the provisions of the Minimum Lot-size Ordinance (Ord. No. 4162) has been filed with the City Planning Commission and a public hearing on the application was held on April 17, 1947 as required by the ordinance.
>
> "The City Planning Commission respectfully requests an opinion on the following two questions:
>
> "1. In a second residential zone under Ordinance No. 4162, must the minimum rear yard depth be measured from the foundation of the dwelling, or may it be measured from a stairway foundation which protrudes into the rear yard?
>
> "2. In a first residential zone under Lot Ordinance No. 4162 where the same conditions prevail, how is the minimum rear yard depth measured?
>
> "Attached you will find a copy of the ordinance referred to and the state legislation referred to in this ordinance.
>
> "I will be glad to discuss these questions with you at your convenience."

O P I N I O N

Ordinance No. 4162 (Series of 1939) amending Article 4, Chapter II, Part II of the San Francisco Municipal Code by adding section 99 thereto, relating to the subdivision of land and the use of lots for dwelling purposes, provides in part as follows:

> "Sec. 99 . . . . .
>
> "(d) Corner Lots - First Residential Districts. In any area previously subdivided in a First Residential

District, the area lying within 100 feet of the corner of a block, measured along each street from such corner, can be resubdivided into lots having a minimum width of 25 feet and a minimum depth of 70 feet; provided, however, that where the City Planning Commission finds that existing conditions do not permit the establishment of the minimum depth of 70 feet such areas can be resubdivided into lots having a street frontage of not less than 25 feet and a depth not less than 57.5 feet. No building shall be constructed upon any such lot which will cover more than 75 per cent of the lot area, or which provides for an open rear yard less than 15 feet in depth.

"(e) Corner Lots - Second Residential Districts. In any area previously subdivided in a Second Residential District, the area lying within 100 feet of the corner of a block, measured along each street from such corner, may be resubdivided into lots having a minimum width of 25 feet and a minimum depth of 57.6 feet. No building shall be constructed upon any such lot which provides an open rear yard of a depth less than set forth in the table given in Section 15682 of Article II, Chapter 7 of the California State Housing Act.

"(f) Variances. The City Planning Commission may, upon application, grant variances from any of the provisions of this section, after public notice and hearings, if it is of the opinion that special circumstances exist in the particular case, and that unnecessary hardship would result from the strict interpretation and enforcement of such provision. The procedure governing such applications, and the granting or denial of such variances, shall be the same as that prescribed by ordinance for zoning changes."

Section 15682 of Article II, Chapter 7 of the California State Housing Act provides:

"The rear yard of an apartment house on an interior lot shall have a depth not less than that set forth in the following table:

"Height of Apartment House Measured from Top of Rear Wall of Building to Ground	Depth of Rear Yard
"Not exceeding 36 feet	10 feet
More than 36 but not exceeding 48 feet	11 feet
More than 48 but not exceeding 60 feet	12 feet
More than 60 but not exceeding 72 feet	14 feet

	Depth of Rear Yard
More than 72 but not exceeding 84 feet . . .	16 feet
More than 84 but not exceeding 96 feet . . .	18 feet
Exceeding 96 feet	20 feet

Section 15684 of the California State Housing Act provides:

> "In the case of an apartment house not more than two stories in height, designed or built to accommodate not more than two families above the first story, the depth of the rear yard may be one-half of that prescribed by this article, but not less than five feet."

The minimum rear yard depth of such corner lots in First and Second Residential Districts as come under the terms of Ordinance No. 4162, is such as is set forth in subdivisions (d) and (e) thereof. It will be noted that in each instance a minimum depth for an "open rear yard" is set forth. An "open rear yard" would call for one to measure the footage (in the illustration given by you) from the stairway foundation which you state protrudes into the rear yard rather than from the rear foundation of the dwelling in such a case.

You have asked that I also consider in this opinion whether the reference to section 15682 of the California State Housing Act, referred to in subsection "e" of the ordinance (supra) could be held to include section 15684 of the State Housing Act as well. You state that section 15682 refers to rear yards in apartment houses and section 15684 constitutes an exception to the area required for the rear yard to an apartment house. I do not believe that section 15684 of the California State Housing Act can be considered in connection with subsection "e" of our ordinance (supra). The last sentence of subsection "e" of our ordinance reads as follows:

> "No building shall be constructed upon any such lot which provides an open rear yard of a depth less than set forth in the table given in Section 15682 of Article II, Chapter 7 of the California State Housing Act."

The reference to section 15682 of the State Housing Act in our ordinance is limited to the table, for the depth of the rear yard, there set forth. Furthermore, in our ordinance the table is applied to any building constructed on a lot covered by the ordinance, and is not just limited to apartment houses as is the provision as used in the State Housing Act. Hence, the special exception as contained in section 15684 of the State Housing Act with reference to a

certain type of apartment house was apparently deliberately not included in our ordinance, and does not apply to our ordinance.

You are thus advised in connection with your inquiries as presented.

Respectfully submitted,

CITY ATTORNEY

City Planning Commission

MSW

April 28, 1947

SUBJECT: CITY OR LESSEE OF CITY PROPERTY, PUT TO A PROPRIETARY USE, CAN FILE APPLICATION FOR ZONING CLASSIFICATION.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

> "This will acknowledge receipt of your letter dated April 16, 1947, concerning the application of the zoning law to city property leased to a private party for a commercial use.
>
> "Now that I have your opinion that the zoning law does not apply to property owned by the city which it proposes to lease to a private party for development for a commercial use, I respectfully request your opinion concerning the following related question: Is it incumbent upon the city or the lessee to file the application for a zoning classification in such a case, or may either the city or the lessee do so?"

OPINION.

Section 117 of the charter provides, in part, as follows:

> "The city planning commission, from time to time, shall consider and hold hearings on proposed changes in the classification of the use to which property in the city and county may be put . . . on its own motion or on the application of an interested property owner."

The city, as the owner of the property involved, is the one for, or on whose behalf, the application for a zoning classification would have to be made in this case.

The city could file the application itself as the owner of the property; or, if a lease actually had been executed to a party, then the lessee, if he desired, could file the application on behalf of the city or as the agent thereof. (See opinion dated November 12, 1946).

You are thus advised in connection with your inquiry as presented.

Respectfully submitted,

JNO. J. O'TOOLE
City Attorney.

To:
City Planning Commission.

NSW

3949

April 30, 1947

SUBJECT: COMMUNITY REDEVELOPMENT ACT

Gentlemen:

You have made request for a digest or outline of the Community Redevelopment Act. The act is 25 pages in length and is so largely procedural that any outline of it which would be a dependable guide would be nearly as long as the Act itself. The summary given below may be of use, especially in the earlier stages, although it will not take the place of reference to the Act.

COMMUNITY REDEVELOPMENT ACT

A. GENERAL NATURE AND PURPOSES OF THE ACT.

The purposes sought to be accomplished by means of the Community Redevelopment Act are the rehabilitation, development or redevelopment of blighted areas in urban and suburban communities.

Blighted areas are broadly defined,--so broadly in fact, that they may be said to include practically any area which constitutes a substantial social or economic liability to the health, safety or general welfare of the community. They may be areas which have lagged behind in development or which have been developed in a manner opposed to adequate living, commercial or industrial use or which have deteriorated so that they have become a liability. In any case, the areas must be in a condition hostile to the health, safety or welfare of the people of the community and state generally. It must also be necessary to use the means provided by the Redevelopment Act to remedy such conditions. The conditions must be such that ordinary police processes will not remedy them. They must be such also that private enterprise will not remedy them without public participation and assistance.

This assistance which must be necessary before the Act is applicable may be in the acquisition of land, in planning and in financing of land assembly, in the work of clearance and in the making of improvements necessary for development.

It is not possible, because of lack of court interpretation of the Act, to say specifically to what areas the Act may be applied, but, if there is any substantial evidence to support the legislative discretion of the Board of Supervisors in the selection of areas described in the Act and in the application of the law to them, the actions of the Board will doubtless be valid.

B. OPERATION OF THE ACT.

1. Redevelopment Areas. The Board of Supervisors, by ordinance, adopted by eight or more votes, designates one or more redevelopment

areas. The Board must hold one or more public hearings on the ordinance before passage. Four weekly notices of such hearing must be published in the official newspaper and copies mailed to assessees of property in the proposed district.

Notice and hearing for selection of project areas may be combined with the foregoing, if desired. (See Section 25 et seq.)

Only one redevelopment area should be included in any one ordinance, but any one redevelopment area may include more than one area of property.

Persons, groups and corporations are privileged to propose to the Board redevelopment areas and plans for their development.

2. Project Areas. The Planning Commission should select one or more project areas comprising all or a portion of a redevelopment area. The Commission may do this voluntarily or at the request of the Board. This request should be by resolution. The Commission should also submit a tentative plan for redevelopment of such proposed project area.

The Board may reject the plan submitted, may refer it back to the Commission or may hold a public hearing on the plan after giving the same notice of the hearing as that earlier described. If the Board finds, after hearing the matter, that the redevelopment is in the public interest and in accord with the Act, it may approve or reject the plan. It may modify the plan before doing either. Approval must be by eight or more votes. Approval should be by resolution.

Such approval must then be followed by formal adoption of the plan by ordinance enacted by the same two thirds vote of the membership.

The resolutions and ordinance are all subject to approval of the Mayor, as provided in the Charter, since, even in a matter which is a state affair and in which the local officer or body may be said to act as an agent of the state, that officer or body must act in the manner provided therefor by the Charter, unless the state law specifically provides a different method of action. The legislative provision must be construed in the light of the legislative knowledge that by Charter a specific method of action is provided for the legislative body which includes action by the Mayor. (City of Los Angeles v. Davidson, 150 Cal. 59,63)

Copies of the ordinance above mentioned must be transmitted by the Clerk of the Board to the Redevelopment Agency hereinafter mentioned and to the Department of Public Works and shall be filed in the office of the County Recorder.

Thereafter building permits in the project area shall be subject to review by the Board for conflict with the redevelopment project by way of interference, retarding or increase of cost.

3. Redevelopment Agencies.

(a) Organization and Powers. A redevelopment agency may be brought into existence in the City and County by a resolution of the Board, adopted by eight or more votes, declaring there is need for it to function. The Mayor shall thereupon appoint five qualified resident electors as members of the agency. If the agency fails to start redevelopment after two years, the Board may suspend its powers. The agency is given ample powers, chief of which are to purchase, operate and develop property, to plan for development of blighted areas subject to legislative approval, and to rent, lease, operate and sell its properties.

(b) Financing. In organization of the agency, the Board may appropriate by eight votes or more, subject to the fiscal provisions of the Charter, such amounts to the agency for administrative purposes as the Board deems necessary.

To carry on the purposes of the agency, the Board may establish a revolving fund, depositing funds in it which are the proceeds of a bond issue on vote of the electorate and without Charter restriction as to amount. From this fund it may make property purchases, clearance and preparation in project areas.

The agency may issue bonds to raise funds for its purposes, subject to the permit of the Commissioner of Corporations, and may proceed by eminent domain. The bonds are made legal investments for fiduciaries, subject to the duty of the fiduciary to exercise reasonable judgment as to the soundness of the project as it relates to the bonds as investments. The real property of an agency is made exempt from execution. Any work of the agency, in excess of $1500, is to be done by contract, subject to the procedure of the city and county as to the letting of contracts. The generally prevailing wage rate is required to be paid in the performance of such contracts. The agency may not buy, without the consent of the owner properties, the buildings of which are to be continued in the same form and use. No plan may be approved unless provision is made for adequate permanent housing of displaced occupants at comparable rentals.

C. CONCLUSION

The Community Redevelopment Act is a community program for solution of the serious problem created by the great ring of deteriorated housing surrounding urban business districts of earlier development. The Act is necessarily long and detailed. The foregoing digest being short,

omits almost all detail. For that purpose, direct reference to the Act must be made. I will be glad to give advice on specific questions at all times.

Respectfully submitted,

CITY ATTORNEY

To: Judiciary Committee
Board of Supervisors
WP

May 2, 1947

SUBJECT: PARKING METER ZONE PRIVILEGES TO VETERANS USING SPECIALLY CONSTRUCTED AUTOMOBILES, VALIDITY OF LEGISLATION GRANTING.

Gentlemen:

You have requested an opinion as follows:

"By direction of the Board of Supervisors I am writing to request your opinion in connection with Bill No. 4709 'Granting parking meter zone privileges to incapacitated war veterans,' which appeared on the Calendar of Monday, April 28, on question of passage for second reading. Particularly, the Board desires to be informed whether or not the provision exempting veterans from payment of parking meter fees is discriminatory in character."

OPINION.

The legislation to which you refer was presented in response to a request to the mayor by the Deputy Administrator of the local branch office of the Veterans Administration. This official's letter on the subject is, in part, as follows:

"Under the provisions of Federal statutes (Public 663, 79th Congress approved August 8, 1946) the Veterans Administration is empowered to provide specially constructed automobiles to certain veterans, who as a result of service in World War II have suffered the loss, or loss of use of one or both legs at or above the ankle.

"A condition precedent is that such veteran will be able to operate such automobile in a manner consistent with his own safety and the safety of others and will be licensed to operate such automobile by the state of his residence or other proper licensing authority.

"All California veterans in receipt of automobiles under this legislation have been licensed by the State of California Motor Vehicle Department following demonstrated ability to operate their automobiles in safety to themselves and others.

"In the city of San Francisco our records show approximately seventy-five veterans of this type are involved. This total will, of course, increase in the future by the number of additional eligibles making applications.

"These veteran amputees are unable to walk from the unrestricted parking areas of the city down into the business section of downtown San Francisco."

Legislation by which veterans have been recognized as a special class appropriate for particular provision has been generally upheld in California.

The federal legislation granting automobiles to the disabled veterans therein referred to is an example of both legislation for a special class, veterans, and for a special subclass of this class, veterans with certain types of disabilities. The legislation is appropriate to the classification and, for the same reason, the subject bill is likewise appropriate to the classification.

As to classified legislation in general the tendency of the courts is to rely increasingly upon the act of the legislature.

> "It is well settled that the authority and duty to ascertain the facts which will justify classified legislation rests in the first instance with the legislature. Every presumption is in favor of the validity of the legislative determination, and its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary."

Franchise Motor Freight Assn. v. Seavey, 196 Cal. 77, 81.

In Board of Directors vs. Rye, 8 Cal. App. 527, 538, a case involving veterans' legislation, the court stated that the

> "Distinction (must be) founded upon the necessity of legislation peculiarly applicable to a particular set of persons who are distinguished from the general body of the people by reason of the possession of some exclusive characteristic or characteristics, common to such set of persons."

The subject bill meets this test entirely. In it, there is clearly a special reason appropriate to the class of veterans described for making meter zone parking privileges free to them.

I advise you that, both in general and in the particular of the granting of free privileges, the subject legislation is entirely valid.

Respectfully submitted,

JNO. J. O'TOOLE,
City Attorney.

To: Board of Supervisors.
cc to Hon. Roger D. Lapham, Mayor.

WP

May 2, 1947

SUBJECT: TERMINATION OF WAR WITH RESPECT TO SECTION 163 OF THE CHARTER DEALING WITH RETIRED PERSONS.

This office is in receipt of your request for an opinion as follows:

"Section 163 of the Charter, as amended, was approved by the voters of the City and County of San Francisco on November 7, 1944, and ratified by the Legislature on January 15, 1945, and reads in part, as follows:

'(b) Should any retired person, except persons retired for service prior to January 8, 1932, and persons retired because of disability incurred in the performance of duty, engage in a gainful occupation prior to attaining the age of 62, the Retirement Board shall reduce that part of his monthly pension or retirement allowance which is provided by contributions of the City and County, to an amount which, when added to the amount earned monthly by him in such occupation, shall not exceed the compensation on the basis of which his pension or retirement allowance was determined.

'The provisions of paragraph (b) of this section shall be inoperative during the existing war between the United States and the Axis Powers and for six (6) months after the termination of said war.'

"A question has arisen as to what constitutes 'termination of said war'. For the proper administration of section 163, it is respectfully requested that you submit an opinion on the point in question."

O P I N I O N

On April 10, 1947, I rendered an opinion to the Civil Service Commission covering Section 145 of the Charter and dealing with the question of when the recent war terminated. I refer you to this opinion. In the final paragraph thereof I stated:

"Hence, you are advised that service beyond December 31, 1946, the date on which the President has declared the cessation of hostilities, can not be construed as service 'in time of war' under the provisions of Section 145 of the Charter."

This opinion is directly in point. In the instant matter it is my opinion that the existing war between the United States and the Axis Powers terminated on December 31, 1946. Therefore, the last paragraph of subdivision (b) of Section 163 hereinabove set forth in your request will cease to be effective on June 30, 1947.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board

WAD

May 8, 1947

SUBJECT: INCLUSION OF ASSESSMENT OF ISLAIS CREEK RECLAMATION DISTRICT WHEN CONSIDERING THE AMOUNT A PARCEL OF PROPERTY MAY BE ASSESSED FOR A PROPOSED IMPROVEMENT OR ACQUISITION.

Dear Sir:

This office is in receipt of a request for an opinion as follows:

"Plans have been completed for the improvement of Barneveld Avenue between Jerrold and Oakdale Avenues and of Loomis Street between Barneveld and Oakdale Avenues. The estimated cost of this improvement is $81,000 and is to be assessed against an assessment district under the provisions of the Street Improvement Ordinance of 1934.

"The proposed improvement is of an expensive nature and the individual assessments will in some cases exceed the assessable limit as defined in Section 1, Part III of the Street Improvement Ordinance. City aid is frequently needed to reduce assessments to the defined limit and this practice is extended to include prior assessments which may have been charged against private property.

"Reference is made to the Special Assessment Investigation, Limitation and Majority Protest Act of 1931, Stats. 1931. This act provides that prior assessments are to be considered in computing the assessable limit for any particular parcel of property. While the local street ordinance does not specifically mention prior assessments, it has been our practice to conform with the intent of the State law governing assessment limitation.

"The proposed assessment district for the improvement of Barneveld Avenue and Loomis Street involves property which was previously assessed for the Islais Creek Reclamation Project. If the prior assessments so imposed by the Reclamation Project are ignored, the contemplated improvement may be performed with City Aid amounting to approximately $15,000. If the prior assessments are considered in computing the assessable limits of the parcels within the proposed assessment district, the assessable limits will be correspondingly reduced, thereby requiring City Aid of approximately $30,000.

"Your opinion is requested on the following questions:

"1. Are the assessments levied under the Islais Creek Reclamation District to be considered as 'Special Assessments' within the meaning of the Statutes?

"2. Should such prior assessments be considered in computing the assessable limit of parcels to be assessed for the proposed improvement?

"Since it is desirable that public proceedings be instituted for this improvement as soon as possible, your early reply will be appreciated."

O P I N I O N

The "Special Assessment Investigation Limitation and Majority Protest Act of 1931" (now a part of the Streets and Highways Code) referred to in your communication provides for a limitation on assessments against property in this State.

Section 2900 found in Part 5 of the Streets and Highways Code reads as follows:

"Abandonment or modification of project estimated to cost more than half of true value of property proposed to be assessed. If the report on the proposed acquisition or improvement shows that the estimated amount proposed to be assessed upon any parcel of land for the proposed acquisition or improvement will exceed one-half of the true value of such parcel as set forth in the report, or shows that the total estimated cost of the proposed improvement or acquisition, less any amount to be paid towards such cost from any source other than special assessments upon the lands benefited by the acquisition or improvement, when added to the aggregate totals of all unpaid assessments and estimated assessments, as such totals are stated in such report, will exceed in total amount one-half of the total true value of all the lands proposed to be assessed, the proposed proceeding shall be abandoned or so modified that the amount to be specially assessed for the cost thereof will be less than the limits hereby established, unless the excess of said cost and indebtedness over one-half of said true value shall be paid from some source other than by special assessment on said lands, or unless the limitation herein provided is overruled."

The report referred to in Section 2900 may be found in Section 2825, and insofar as pertinent to our present inquiry, Section 2825 of the Streets and Highways Code reads as follows:

"***(h) [Amount of assessments.] The amount, as near as may be determined, of the total principal sum of all unpaid special assessments and special assessments required or proposed to be levied under any completed or pending assessment proceedings, other than that contemplated in the instant proceedings, whether direct or ad valorem, upon each parcel of the lands proposed to be assessed, which, if the proceedings therefor were begun after this division became effective, would require an investigation and report under this division.

"(i) The estimated amount of the assessment for the proposed acquisition or improvement to be levied upon each parcel of land to be assessed."

Section 2804 states that the act does not apply to irrigation districts, irrigation improvement districts, fire districts, fire protection districts or the public cemetery districts or to a chartered city when improvement proceedings have complied with the provisions of Section 17 of Article XIII of the Constitution.

It is evident by virtue of the provisions of Section 2820 that the Islais Creek Reclamation District is included in the Special Assessment Investigation Limitation and Majority Protest Act of 1931, as Section 2820 reads as follows:

> "Proceedings prerequisite to initial action. Before any ordinance or resolution of intention may be adopted, or other initial action prescribed by any law of this State taken by the legislative body of any county, city, district or other public corporation, for ordering the construction of any public improvement or the acquisition of any property for public use where the cost of such construction or acquisition is to be paid in whole or in part by special assessments or through special assessment taxes upon lands, the proceedings required by the division shall be taken."

It will be noted from the above that Section 2900 provides that the proposed improvement must not exceed one-half of the true value of the parcel to be assessed and that in computing this one-half all assessments including the proposed assessment must be added together. If the total of all the assessments as provided above, amount to more than one-half, the project must be abandoned and funds from other sources must be applied toward the cost of the project so as to bring the assessment to one-half or less.

The pertinent portion of Section 2825 quoted above, brings the Islais Creek Reclamation District within the provisions of the act in that it is not excluded by Section 2804 and the Reclamation District is expressly included by virtue of the provisions of Section 2820.

You are therefore advised in the affirmative that the Islais Creek Reclamation District comes within the provisions of the Special Assessment Investigation Limitation and Majority Protest Act of 1931, and therefore the assessments levied under the Islais Creek Reclamation District are to be considered as special assessments.

Your answer to question 2 is also in the affirmative as it follows that such prior assessments must be considered in computing the assessable limit of parcels to be assessed for the proposed improvement.

However, Section 17 of Article XIII of our State Constitution provides that notwithstanding any provisions for debt limitation or majority protest, if, after the giving of such reasonable notice by publication and posting and the holding of such public hearing as the Board of Supervisors shall prescribe, the Board of Supervisors by not less than four-fifths vote of all members thereof, may find and determine that the public convenience and necessity requires the improvements. In such event the provisions of the Special Assessment Investigation Limitation and Majority Protest Act of 1931 do not apply.

Respectfully submitted,

CITY ATTORNEY

To: H. C. Vensano, Director
Department of Public Works

Through Mr. T. A. Brooks
Chief Administrative Officer

RJB

2753

May 5, 1947

SUBJECT: COMMUNITY OR SEPARATE CHARACTER OF FUNDS RECEIVED BY OLD AGE RECIPIENT FROM SETTLEMENT OF CLAIM FOR PERSONAL INJURIES.

Dear Sir:

Your request for an opinion reads as follows:

"In order to determine the eligibility for the continuance of Old Age Security granted under the provisions of the Welfare and Institutions Code it is necessary for this department to determine the extent of the personal property holdings of Mr. and Mrs. Lee. May we have your opinion whether a settlement for personal injuries received by Mr. Lee, who has been separated from his wife, constitutes separate or community property.

"The facts of the case are as follows: Mr. Arthur J. Lee has been receiving Old Age Security for a number of years from this Department. His wife, from whom he has been living separate and apart since 1934, has also been in receipt of aid for a number of years. The couple's separation was by mutual agreement, and no action for divorce has been taken by either party. On June 20, 1946, Mr. Lee suffered an accident, and a settlement was made in his behalf from which he received the sum of $1,365.00 (after expenses were met) on February 21, 1947. As Section 2163 of the Welfare and Institutions Code permits a person ownership of up to $600.00 in personal property, aid payments were suspended.

"The question arises as to whether the $1,365.00 in Mr. Lee's possession is his separate property, in which case he would have to spend $765.00 before he again was eligible to assistance, or whether this settlement for personal injuries is community property, in which case Mrs. Lee is also ineligible to assistance but would again be eligible at such time as $165.00 had been expended. Neither Mr. Lee nor Mrs. Lee has other assets.

"Mrs. Lee has approached her husband endeavoring to secure part of these funds, but he has refused to give her any portion of them. As this department presumes property held in the name of the spouse of a married applicant to be community property until such presumption is refuted, we are asking your opinion in this case to properly determine the Lees' eligibility."

O P I N I O N

Community property is defined by Civil Code Section 687 as being property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.

Separate property is defined by Civil Code Sections 162 and 163 as being all property owned by either husband or wife before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof.

Husband and wife may enter into any contract they desire concerning their property. (Civil Code Section 158) This means they may agree with each other that all property acquired by either during marriage may be considered the separate property of the one acquiring it.

In the absence of such agreement, all property acquired by either during marriage, except that acquired in the manner described in Sections 162 and 163 of the Civil Code set out in part above, is community property, even though they be not living together as husband and wife.

It follows therefore that the money received by Arthur J. Lee for personal injuries suffered by him is community property unless he and Mrs. Lee have an agreement to the contrary.

Respectfully submitted,

CITY ATTORNEY

TO: Director of Public Welfare
Department

CHA

May 8, 1947.

SUBJECT: Capital Expenditures, New Equipment and Play Apparatus, Park Department

Gentlemen:

I have received your request for an opinion, as follows:

REQUEST

"I have been directed by the Finance Committee to request your opinion as to whether recreational equipment in the Park Department Budget consisting of the following items is considered a capital expenditure:

One vibrating screen loader (for beach cleaning)	$9,000
New Play Apparatus, to be installed in additional play area	7,500"

OPINION

Both of the items above set forth are in the nature of additions to the plant, to the capital investment, of the Park Department. Neither item is in the nature of a replacement merely. Both are improvements as well as additions. They are therefore in every sense clearly capital expenditures.

For a more extended discussion of this subject, I refer you to my opinion to the Board of Supervisors, dated May 3, 1946.

Respectfully submitted,

CITY ATTORNEY

Finance Committee
Board of Supervisors

WP

May 8, 1947

SUBJECT: PROCEDURE FOR ASSEMBLY OF LAND FOR PROPOSED GARAGE BUILDING BOUNDED BY MINNA, NATOMA, THIRD AND EIGHTH STREETS.

Gentlemen:

You have requested an opinion as follows:

"WHEREAS, on October 21, 1946, the Board of Supervisors requested the City Planning Commission and the Department of Public Works to make preliminary studies of a plan for a proposed garage building fronting on Minna and Natoma Streets between Third and Eighth Streets; and

"WHEREAS, This plan proposed garage space for approximately 20,000 cars, with freeways having direct connection with the Bay Bridge, Bay Shore Freeway and other major traffic outlets in the city and county of San Francisco; and

"WHEREAS, The Planning Commission subsequently referred the proposal to the Mayor's Transportation Council; and

"WHEREAS, On February 20, 1947 the Mayor's Transportation Council indicated that the plan 'deserves extended study as part of any over-all plan for the improvement of transportation facilities'; and

"WHEREAS, Leonard Mosias, consulting architect, and Planco consulting engineers of the City and County of San Francisco, as a public service, have completed preliminary sketches and plans and have computed anticipated revenues and approximate costs of this proposal; and

"WHEREAS, It is now essential to receive an opinion from the City Attorney as to the most advantageous way to assemble the land needed for this project, whether it be through the off street parking laws or the Community Redevelopment Act, or any other source; now, therefore, be it

"RESOLVED, That the City Attorney be and he is hereby requested to furnish this Board of Supervisors with a written opinion as the earliest possible time as to the most practical procedure, to assemble this land to make it available for repurchase by private capital, or for the public construction of such a building."

O P I N I O N

There are several methods of approach to this problem, none of which seems to me to be satisfactory in its present form. Amendments pending before the Legislature may possibly be of assistance.

1. Community Redevelopment Act. I do not regard the Redevelopment Act as intended for this type of purpose. While the Act might possibly be used for such a purpose, it would be a case of an adaptation of the Act to a case foreign to its primary intent. It seems vital that the first experience with the Community Redevelopment Act be strictly for rehabilitation of a blighted area as described in the Act. I believe that, if the Act is to be of value as a legal instrument, this should be the attitude toward it at the present time.

2. Section 1238.1 Code of Civil Procedure and Section 1001 Civil Code. Section 1238 Code of Civil Procedure includes 22 classifications of uses for which eminent domain may be used. Section 1238.1 authorizes eminent domain for off street parking purposes established by any city or city and county for public use. Section 1001 Civil Code provides that any person may acquire private property for the uses specified in Section 1238 Code of Civil Procedure, but makes no reference to Section 1238.1. Perhaps the oversight is not fatal, but it should be remedied by the legislature. In the meantime, I doubt the advisability of relying upon Section 1001 Civil Code.

Section 1001 Civil Code has also been held to be limited to persons authorized to exercise the use for which eminent domain is sought. There is some doubt if Section 1238.1 Code of Civil Procedure is a sufficient authorization to the city and county for this purpose.

3. Vehicle Parking District Act of 1943. (Deering Act No. 5131.3, Statutes 1943, Chapter 971) This Act enables the Board of Supervisors to procure the necessary land by eminent domain and to set up a parking district to administer the property. The entire proceeding can only be initiated by petition of owners of property of at least twenty per cent of the assessed valuation in the district. District assessments may be levied if necessary. A board of parking place commissioners is authorized to operate the property and to collect rental charges.

No provision is made for rental for any other purpose than parking. I call attention to this because of the specification in the prospectus of the use of the ground floor and basement floor for stores.

An amendment to this Act, now pending in the Legislature, Senate Bill 173, to include unincorporated areas in the Act, might possibly be altered to provide for rental for other purposes than parking. A private purpose such as rental for stores could not legally be made a basis for eminent domain. Such use could only be justified as a necessary incident to the main purpose.

The recent case of Ambassador Management Corporation v. Village of Hempstead, New York Court of Appeals, now on certiorari to the United States Supreme Court, questions the constitutionality of the use of local assessments to acquire land for off street parking purposes. The New York Court of Appeals decided in favor of the use, but it will probably be some time before the appeal will be decided by the United States Supreme Court.

The Vehicle Parking District Act is quite complete and has the merit of providing funds to acquire the property, construct buildings, and for other costs, by means of district assessment.

4. Chapter 746, Statutes 1927, a law providing for the use of public property for parking, will, if amended, provide another means for accomplishing the purpose. Senate Bill 173, now pending in the Legislature, proposes to amend this law to provide, among other things, as follows:

1. That the City and County may acquire property, by eminent domain and otherwise, for use for the parking of motor vehicles.

2. That it may lease or sublet such property or other property for such purposes.

3. That it may itself impose and collect reasonable charges for parking off street of motor vehicles.

It will be noted that neither the law nor the proposed amendment provides for leasing for other purposes than parking. Unless the bill is amended to take care of this, it would be impossible to lease for store purposes, except under the charter as surplus property. I doubt if any amendment could legally authorize the use of eminent domain for a purpose so largely private in its original plan as that for the leasing of the entire ground floor and basement for store purposes.

If the amendment becomes law, the funds necessary for acquisition could be either general funds budgeted for the purpose or proceeds of a bond issue for the purpose.

5. Conclusion. Under none of the foregoing could the land be assembled legally by the City and County for a vehicle parking district for the purpose of resale to a private person. But, under paragraph 4, it could be assembled for lease to a private person.

In answer specifically to your request that I recommend the most practical procedure for land assembly for this project, I advise that if your purpose is to finance by assessment you should proceed, after petition by the required property owners, through the Vehicle Parking District Act of 1943. If your purpose is to finance the project by bond issue, I would suggest that you support the amendment of the Statute of 1927 referred to in paragraph 4 hereof, and proceed under that act, if amended as proposed. If a more detailed study becomes necessary, I will be glad to respond to your further request.

Respectfully submitted,

TO: Board of Supervisors CITY ATTORNEY

WP

May 8, 1947

SUBJECT: DOCTORS AND PSYCHIATRISTS OF JUVENILE COURT DEPARTMENT - COMPENSATION OF, WHEN TESTIFYING FOR JUVENILE COURT.

Dear Sir:

I am in receipt of your request for an opinion.

"On various occasions doctors and psychiatrists engaged on a part-time basis in the Juvenile Court Department are called upon by the Judge of the Juvenile Court to give testimony in the Court on a case, if they have performed a personal examination. Usually such examinations are made and the testimony is given during the hours the doctors are on duty in the Juvenile Court Department, carrying out their various responsibilities.

"On each occasion in the past the doctors and the psychiatrists have submitted a separate bill to the Court for such time and testimony presented. It is understood that the money is derived from the Superior Court Department upon the approval of the Judge of the Juvenile Court.

"The question in point is whether or not this is a proper authorization by the Judge of the Juvenile Court, inasmuch as such individuals are on part-time monthly salary by the Juvenile Court Department.

"Doctors and psychiatrists are on duty during the morning hours, during which the examinations and testimony usually take place. If such service is rendered by them during the afternoon, would this be a proper charge?

"I should be happy to have an opinion that will direct me regarding the financial payments in this matter."

O P I N I O N

Your request for an opinion covers the cases of doctors and psychiatrists engaged by the Juvenile Court Department on a part-time basis who are called to testify by the Judge of the Juvenile Court:

1) During the time when such doctors and psychiatrists are on duty in the Juvenile Court Department carrying out their various responsibilities; and

2) During the time when such doctors and psychiatrists are not on duty in the Juvenile Court Department.

You are advised that if the doctors and psychiatrists are called upon by the Judge of the Juvenile Court to testify during the

time they are on duty at the Juvenile Court Department they are not entitled to extra compensation for their testifying inasmuch as they are performing part of the duties for which they are engaged during the period that they are on duty. However, if the doctors and psychiatrists are called upon by the Judge of the Juvenile Court to testify when they are not on duty they are entitled to compensation for such appearances inasmuch as such appearances at that time are beyond the scope of their duties.

Respectfully submitted,

CITY ATTORNEY

To: Chief Juvenile Probation Officer
LJM

May 13, 1947

SUBJECT: REAPPOINTMENT OF PATROL SPECIAL OFFICER AFTER RESIGNATION

Dear Sir:

I am in receipt of your letter under date of April 22, 1947, in reference to one Angelo de Martini whom you state has made application to the Board of Police Commissioners for leave to purchase a patrol special officer's beat and a request for his reappointment as a patrol special officer in charge of another beat. It appears from the tenure of your letter that Mr. de Martini was, for many years, a patrol special officer and was the owner of a beat at a location different from the one that he now desires to acquire. He is over the age of 40 years and therefore comes within the prohibition contained in Section 35.10 of the charter. The only question to determine is whether he has permanently parted himself from his service to the city as a patrol special officer.

O P I N I O N

Section 35.10 provides for the reappointment of patrol special officers but I do not believe this gives to the Commission the unlimited right to reappoint anyone who may have been a patrol special officer at the effective date of this particular amendment to the Charter and who may have severed his connection with the service. I think the Commission should look upon the matter from a narrower point of view and if in its opinion there was a valid reason for the resignation of the patrol special officer and the officer promptly asked for re-instatement as soon as existing conditions were removed, that it lies with in the power of the Commission to take all of these matters into consideration. If the Commission finds that the particular officer had a valid reason for resigning, and as soon as this particular reason was removed had made prompt application to be reinstated in his position, then they should give consideration to his request. If the request was reasonable, it should be granted and the particular officer should be reinstated and permitted to carry on his calling either in his previous location or in a new location if he was able to acquire one. This does not mean that a person can resign from this particular service and come back at any time he sees fit.

I can see no objection if the facts outlined above are present for the Commission to exercise its sound discretion and permit a person to return to his previous calling, however there is nothing mandatory in the section to compel the Commission to so act. It should be borne in mind that a patrol special officer has a property right in his position and that the Police Commission should, so far as possible, protect this right when such protection does not interfere with vested interests. However, as I have already said, each case must be determined by the particular facts incident thereto.

Respectfully submitted,

CITY ATTORNEY

To: Captain Michael Gaffey
Secretary, Police Commission

BJM

May 13, 1947.

SUBJECT: RETROACTIVE VACATIONS; RIGHT OF RETURNED VETERANS UNDER CHARTER SECTION 153 TO;

Dear Sir:

You have referred to me the letter of Mr. John Shannon, Commander of San Francisco Chapter of the Disabled American Veterans, relating to Charter section 153. It is Mr. Shannon's contention that this section grants veterans who have returned to city employ upon discharge from the armed forces, vacation pay for the period they were in military service. He states that such employees are not receiving this back vacation pay because of an erroneous opinion issued by me, and requests that this opinion be reviewed.

O P I N I O N.

On April 17, 1946, I rendered an opinion before Charter section 153, as amended, became effective, which, in substance, stated that the amendment in question was not designed to, nor did it have the effect of granting retroactive vacation rights to veterans for the period they were in the military service. Because of the strong representations contained in Mr. Shannon's letter, I have carefully reconsidered this entire matter. In spite of this, I am forced to conclude that my former opinion reached the correct result in view of the wording of the amendment.

The pertinent language of the charter section reads as follows:

> "Any officer or employee on military leave, who, prior to such leave, has been appointed to a permanent position in the city and county service, shall be entitled to resume such position at the expiration of his leave, and in determining and fixing rights, seniority, salary and otherwise, which have accrued and shall inure to the benefit of such officer or employee, the term of military leave shall be considered and accounted a part of his service under the city and county."

There is nothing in the amendment that states directly and unequivocally that retroactive vacations are to be granted. The authority for such action must therefore be sought by implication within the clause:

> "*** in determining and fixing rights, seniority, salary and otherwise, which have accrued ***."

The only rights expressly mentioned are salary and seniority. The use of the general word "otherwise" following them does not extend the application of the amendment to all possible rights. The effect of such a general term is limited by the long recognized rule of statutory construction, ejusdem generis. When words of specific intent are followed by a word or words of general scope, such generalities are confined in their application to the class of objects enumerated by the preceding specific words.

Since there is nothing in "Seniority and Salary" rights relating to vacation rights, it is my conclusion that the word "otherwise" does not include any rights of this class.

Ignoring for the moment the language of the amendment, it appears that the interpretation that Mr. Shannon advocates would be entirely inconsistent with the purpose of granting a vacation. As pointed out in Amar v. Los Angeles (7 Cal. App. (2d) 290), it is a surcease or rest from work given in order to permit the employee to recover from the year's toil. The employer naturally anticipates that employee will render more efficient service as a result. If this purpose is to be accomplished, the vacation must be taken in the year earned and cannot be accumulated. Thus, the contention that the charter amendment in question grants vacation pay to those who were on military leave, and at the time were not even in the employ of the city, would completely ignore and be inconsistent with the purpose in giving a vacation. It would, in effect, be a retroactive bonus of two weeks pay for each year that the employee was on military leave and in the actual employ of another. If this were the intent of the voters, it would have to be clearly and unequivocally expressed rather than raised by implication.

If Mr. Shannon's interpretation of the amendment is correct, there is a strong probability that the courts would hold that such retroactive effect would constitute a gift of public moneys, since there was no obligation to grant vacation allowances prior to the adoption of this amendment. (See generally NOLLETT v. HOFFMAN (Minn.), 297 N.W. 164, 134 A.L.R. 192). Such a gratuity would very likely fall within the prohibition of Article IV, Section 32 of the Constitution of the State of California (vid. LAMB v. BOARD OF PEACE OFFICERS, 29 Cal. App. (2d) 348), and be held unconstitutional.

Heavy emphasis has been placed upon the fact that the period veterans were absent on military leave is counted in computing the sick leave the employee is entitled to upon return to the city employ. This is no authority for granting retroactive vacations, for by charter provision, sick leave is cumulative and can be built up from year to year. The effect of such computation as to sick leave is to grant prospective benefits to the veterans. If sick leave is used as a measure of the veterans' vacation rights, then it must be urged in the same manner that vacation rights are demanded. Obviously the veteran could not say that because he was sick for two weeks during a given year while in the military service that he now is entitled to two weeks' pay as sick leave for that period. It appears that is precisely the contention now adopted by Mr. Shannon with relation to vacations that the veteran would have received if he had not been on military leave.

Some point is made that veterans could not take vacations while in fox-holes. It should be noted that under the terminal leave plan enacted by Congress, military personnel, enlisted and commissioned, received payment for such leaves that were not granted them while on active duty.

Therefore, I am obliged to conclude that Section 153 of the charter, as amended, does not grant retroactive vacation rights to employee veterans while absent on military leave.

Respectfully submitted,

CITY ATTORNEY

To: Honorable John J. Sullivan
Board of Supervisors
City Hall

CAN

May 13, 1947.

SUBJECT: Automatic Washing Machines - Whether to be Considered a Laundry.

Dear Sir:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"On May 1, 1947, application was made with this department by Mr. E. R. Moore for permit to conduct a laundry at 3220 - 18th Street.

This application is unusual as far as laundries are concerned. The following explanation is offered:

This gentleman wants to install seven or eight automatic washing machines in these premises. The public would be asked for their patronage and anyone could bring his laundry into the premises and use one or more of the machines and would be charged an hourly rate for the use of said machine.

This rate charge would not be in the form of a vending machine as it would be collected by the operator of the premises.

Here we have an application relating to laundries that is from the vending machine type and also different from the usual operation of a laundry.

I would appreciate knowing from you whether or not this department has supervision over this type of installation and if so would the regular requirements necessary for the installation of a commercial laundry be in effect."

OPINION

This office rendered an opinion under date of October 26, 1945, advising that a license fee is not required for the type

of automatic washing machine referred to in your request, as Section 5 of the City Planning Code, dealing with laundries, does not cover this type of operation.

I further held in this opinion that automatic washing machines do not come within the purview of the provisions of Section 7 of the Health Code, as this section deals with laundries. A permit therefor is not required for automatic washing machines.

On August 30, 1946, I rendered a further opinion wherein I stated:

> "You are therefore advised that the operation of a 'coin-in-slot launderette', as hereinbefore described, is not a 'laundry' as that term is used in Part II, Chapter II, Article I, Section 5 "j" of the San Francisco Municipal Code; and such a 'coin-in-slot launderette' is not prohibited in a commercial district under our zoning law."

The only difference between the operation of the automatic washing machine mentioned in your communication and the one referred to in the opinion of August 30, 1946, is that the one mentioned in the opinion is a "coin-in-slot launderette", and the one mentioned in your communication is one wherein an hourly charge is made depending upon the length of time the machine is used. This difference, however, would not in any way change the actual operation of the machines.

You are therefore advised that under existing ordinances there is no provision for regulation by the Health Department of automatic washing machines. As pointed out in my opinion, the automatic washing machine cannot be considered as a commercial laundry.

Respectfully submitted,

CITY ATTORNEY

To: Director of Health

RJB

2760

May 15, 1947

SUBJECT: LATERAL AND SUBJACENT SUPPORT OF JUVENILE DETENTION HOME BUILDINGS

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Your opinion is requested on the following matter:

"The City is the owner of a frame building which is part of the Juvenile Detention Home Buildings at Otis and McCoppin Streets. The foundation of this building extends to a grade about the same level as the intersection of the adjoining property line and the curb.

"The Pacific Telephone and Telegraph Company, represented by Monson Bros., contractors, has given notice to the Department of Public Works that they are excavating for a new building adjacent to the above foundation, to a depth of approximately 13' below the intersection of the adjoining property line and the curb.

"The following questions arise:

"1. Is the City obligated to protect its building?

"2. If the City is obligated to protect its building, to what depth must the City extend its footings?

"3. If the City is obligated to extend its footings to a lower level, is it necessary that the City construct its footings so as to provide for the lateral pressure of the land under its building?"

O P I N I O N

The law governing lateral and subjacent support is set forth in Civil Code Section 832 which is too long to quote in its entirety. This section provides in part as follows:

"Each coterminous owner is entitled to the lateral and subjacent support which his land received from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, under the following conditions:"

The conditions in the section are:

1) Notice to adjoining owners. Reasonable notice must be given by the owner of the land or his lessee intending to make or to permit the excavation to the owner or owners of adjoining lands stating the depth of the excavation and the date when it will commence.

2) Degree of care. Liability for damage to building. In making any excavation ordinary care and skill must be used and reasonable precautions taken to sustain the adjoining land as such, without regard to any building or structure thereon. There shall be no liability for damage to any building or other structure by reason of the excavation except as otherwise provided and allowed by law.

3) Building owner allowed thirty days. If the excavation is intended to be or is of a greater depth than the walls or foundation of any adjoining building or other structure and so close as to endanger the building or other structure, then the owner of the building or other structure must be allowed at least thirty days in which to take measures to protect the same from any damage or in which to extend the foundations thereof.

4) Standard Depth. Duty and liability of owner of land being excavated. Standard depth is defined to be a depth of twelve feet below the adjacent curb level at the point where the joint property line intersects the curb. If the excavation is intended to be or is deeper than the standard depth of foundations and if on the adjoining land there is any building or other structure the wall or foundation of which goes to standard depth or deeper than the owner of the land on which the excavation of the land is being made is required to protect the adjoining land and any such building or structure thereon without cost to the owner thereof.

From the above it will be noted that the owner of land has a right to the support which the adjoining land gives to his land in its natural condition. However, if any building or structure is placed upon the land, the obligation is upon the owner of the building to take the necessary steps to support his building when any excavation is being made on the adjoining land, with the exception that if the foundation of his building extends to or is deeper than the standard depth of foundations, that is a depth of twelve feet below the adjacent curb level, at the point where the joint property line intersects the curb, then the owner of the land on which the excavation is being made is obligated to protect the adjoining land and the building thereon.

In specific answer to your questions:

1) As the foundation of the building in question extends to a grade about the same level as the intersection of the adjoining property line and the curb and is therefore not as deep as the standard

depth of the foundations defined in Civil Code Section 832, the obligation is upon the City and County of San Francisco to protect its building.

2) Civil Code Section 832 was amended in 1931 by adding thereto condition (4) defining standard depth of foundations as a depth of twelve feet below the adjacent curb level, at the point where the joint property line intersects the curb and providing that if the excavation is intended to be or is deeper than the standard depth of excavations and if on the lad of the coterminous owner there is any building or other structure the wall of the foundation of which goes to standard depth or deeper, then the owner of the land on which the excavation is being made shall protect the said adjoining land or any such building or other structure thereon without cost to the owner thereof. There has been no court interpretation to date of this provision. Condition (4) as worded applies only to buildings with foundations of standard depth. A reasonable construction of the section would require that owners of buildings whose foundations are less than standard depth increase the foundation of their building to the standard depth thus bringing themselves within the provisions of condition (4) whenever an excavation greater than twelve feet in depth is to be made or has been made on the adjoining land. Thereafter, the obligations to take necessary steps to protect the building would be upon the owner of the land upon which the excavation is being made rather than upon the owner of the building.

You are therefore advised that when the City and County of San Francisco has extended the foundation of its building to the standard depth, that is twelve feet below the adjacent curb level, at the point where the joint property line intersects the curb, the obligation thereafter will be upon the adjoining land owner making the excavation to protect the land and the building of the City and County of San Francisco.

3) In making any excavation the owner of the land making the excavation must use ordinary care and skill and take reasonable precautions to sustain the adjoining land as such, without regard to any building or other structure thereon.

<u>Civil Code Section</u> 832 (2)

Condition (4) of Civil Code Section 832 provides that if the excavation <u>is intended to be or is deeper</u> than the standard depth of foundations and if on the land of the coterminous owner there is any building the foundation of which goes to standard depth, then the owner of land on which the excavation is being made shall protect the said adjoining land and building without cost to the owner thereof.

You are therefore advised that if the City and County of San Francisco extends the foundations of its building to the standard depth as defined in Civil Code Section 832, that is, twelve feet below the adjacent curb level at the point where the joint property line intersects the curb, the obligation would then be upon the owner of adjoining land making the excavation to protect the adjoining land of the City and County of San Francisco without any cost to the City and County of San Francisco.

Respectfully submitted,

CITY ATTORNEY

To: Department of Public Works
cc: TABrooks
LSM

May 16, 1947.

SUBJECT: Authority of Director of Public Health to Charge for Information Required by California Unemployment Insurance Act.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST.

"This is with reference to Board of Supervisors Ordinance 2067, Bill 2166, approved April 14, 1943, and the obligation of the Department of Public Health thereunder to charge the statutory fee for completion of the Physicians Certificate for claimants applications for Disability Insurance Benefits.

"For your information herewith are the following documents relating to the subject:

"Facts about Disability Insurance"

"Supplement to California Unemployment Insurance Act"

"Sample forms for the initial and continued claims to be completed in connection with such claims"

"Excerpt from State Department of Employment regulations 271."

These claims have lately and progressively presented a series of personnel problems in the San Francisco Hospital medical record room, the Superintendent's office and the hospital's medical staff which must process them. It is extremely difficult to keep current with these reports, of which there are now about 275 each month.

You will note that Regulation 271, above referred to, indicates that evidence for continued claims may be obviated if claimant is obliged to incur expense in obtaining same.

Will you therefore kindly advise if the Department of Public Health is obliged to charge the fee stipulated in Ordinance 2067 for completing the forms for

(a) initial claim for Disability Insurance and

(b) the continued claim for Disability Insurance?"

"The pertinent portion of Ordinance No. 2067 referred to in your communication reads as follows:

"AUTHORIZING THE DIRECTOR OF PUBLIC HEALTH OF THE CITY AND COUNTY OF SAN FRANCISCO TO CHARGE FEES TO DEFRAY THE COST OF THE ISSUANCE OF COPIES OF CERTAIN DOCUMENTS.

Be it ordained by the People of the City and County of San Francisco, as follows:

Section 1. The Director of Public Health of the City and County of San Francisco is hereby authorized to charge the following fees to defray the cost of issuance of the following mentioned documents and any person requesting said documents shall pay the fees herein specified, towit:

1. Abstract or Brief Statement of Medical History or data for insurance or legal purposes .....$1.00 (but not less than 20c per folio).
2. Proof of Death for Insurance purposes .....$1.00"

I have reviewed the literature which you have forwarded to me and it is noted that the pamphlet is prefaced as follows:

"At the 1946 special session of the Legislature there was added to the Unemployment Insurance Act Article 10, which establishes a system of Unemployment Compensation Disability benefits within the Unemployment Insurance System."

The brochure which is given to California employees is entitled "Facts About Disability Insurance."

The disability claim form has one page of instructions. Throughout this page the terms "Disability Insurance Benefits" and "Unemployment Insurance Benefits" and "California Unemployment Insurance Act" are used. The follow-up form is entitled "Continued Claim for Disability Insurance."

There appears no doubt that the forms which are required to be completed by your department cover requests for insurance.

In view of the fact that Ordinance No. 2166 provides for a fee whenever an "Abstract or Brief Statement of Medical History or data for insurance or legal purposes" is requested, the Director of Public Health is authorized to make a charge for such information.

You are therefore advised that a fee may be charged under both (a) and (b) of the queries propounded in your communication.

Respectfully submitted

To: Director of Health.
cc - Thomas A. Brooks.

CITY ATTORNEY.

RJB

296 2

May 20, 1947

SUBJECT: STATUS OF TITLE OF PALACE OF FINE ARTS; USE OF PALACE OF FINE ARTS FOR FLOWER SHOW; USE OF PALACE OF FINE ARTS FOR AGRICULTURAL FAIR

Gentlemen:

You have made the following request for my opinion:

> "It will be appreciated if you will advise this office at your earliest convenience on the following matters pertaining to the Palace of Fine Arts:
>
> "(a) Can the Palace of Fine Arts be used as a permanent location for a City and County of San Francisco Agricultural Fair such as an expanded San Francisco Flower Show? (S.F. Charter Sec. 41 and State Agricultural Code, Div. 1, Ch. 3)
>
> "(b) What is the present status of the title to the subject land and building, particularly as to the United States government use and occupancy of same now or at some future time?
>
> "A copy of Resolution No. 6356 adopted by the Board of Supervisors on March 24, 1947, and approved by the Mayor on March 25, 1947, relative to the above subject is attached hereto."

O P I N I O N

Answering (b) above first, the title to this particular 9.93 acres of land was originally held by the United States. It was deeded to the City and County of San Francisco on June 3, 1927, pursuant to an Act of Congress of March 3, 1925 (43 Stats. at large P. 1129). The land was granted for educational, art, exposition and park purposes. The following reservation was made:

> "provided, however, that in the event of war or any other great national emergency, the United States shall have the right, which it hereby reserves, to take exclusive possession of said land and all improvements thereon, without the payment of any compensation therefor, and to hold, occupy and use the same during the continuance of such war or emergency;"

Thus, while the city is the owner in fee for certain purposes, the Government of the United States has reserved to itself a right of

user and exclusive possession during war or other great national emergency. If such conditions occur, and the United States enters into possession of the land and improvements, the title of the City and County is not thereby defeated, but its right to beneficial enjoyment is suspended during such occupancy.

Pursuant to this reservation, the United States Army entered into possession of the Palace of Fine Arts during August 1941 and remains in control now. The Secretary of the Park Commission has not received any indication when the Army will vacate the premises.

No prediction can be made as to the future use of this property by the United States except to observe that the right to assert possession again can come into existence upon the occurrence of the conditions noted.

The next inquiry relates to the proposed use of this land as a City and County Fair or expanded flower show. There seems to be nothing inconsistent between such uses and the purposes for which the land was granted by Congress.

Even though the terms of the grant may not be violated, doubt exists as to the power of the Park Commission to authorize such use of land under its control.

Charter Section 41 provides as follows:

> "The commissioners shall have the complete and exclusive control, management, and direction of the parks, squares, avenues, grounds and recreation centers, now or hereafter placed under charge of the commission, including exclusive right to erect and to superintend the erection of buildings and structures thereon, except as in this charter otherwise provided.
>
> "The commissioners shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any part, square, avenue or ground, except for recreation purposes, and each letting or permit shall be subject to the approval of the board of supervisors by ordinance . . ."

This requires the commission to limit the use by others of lands or buildings under its control to recreation purposes. Whether the scope of such purposes can be stretched to include the proposed use as a fair conducted by the Agricultural District 1a is open to doubt. There are no cases that resolve this doubt, so that to obtain a definite answer, judicial adjudication would be required.

However, this problem may be obviated under the particular facts of this case if the Park Commission itself should conduct the contemplated

flower show. An exhibition of this nature would appear to be within the authority of this commission and such an arrangement seems permissible by the terms of Agricultural Code Section 87.

Respectfully submitted,

CITY ATTORNEY

To: Park Commission
GAH

May 21, 1947

SUBJECT: ZONING ORDINANCE, APPLICATION OF, TO PROPERTY OWNED BY THE CITY AND COUNTY OF SAN FRANCISCO

Gentlemen:

I am in receipt of your request of an opinion as follows:

"The City Planning Commission has been asked whether a city department or a city commission owning land within the city and county of San Francisco can change the use classification without applying for a zone change through the City Planning Commission.

"In order that you may have a clear idea of the problem, I will give you the particular cases involved:

"(1) The Public Utilities Commission owns property on the north side of Ocean Avenue, between Plymouth and Phelan. The property is zones first residential. It is assumed that the Utilities Commission proposes to build a bus garage and terminal. This use would be light industrial and thus necessitate a zone change;

"(2) The Department of Public Works owns property on the east line of 19th Avenue, between Santiago and Rivera Streets. The property is zoned second residential. The use is a street cleaning unit and street repair shop. This would be a light industrial use and necessitate a zone change.

"The City Planning Commission appreciates your cooperation in this matter."

O P I N I O N

The question raised in your request is whether a municipal corporation is bound by the provisions of its zoning ordinance in the use of its property.

The general rule is that in the interpretation of a legislative enactment a municipal corporation is not bound by general words limiting the rights and interests of its citizens unless the municipal corporation is included within the limitation expressly or by necessary implication.

C. J. Kubach Co. v. McGuire,
199 Cal. 215

The Kubach case, supra, held that the provisions of the Charter of the City of Los Angeles prohibiting the erection of a building or structure of a height exceeding 150 feet was not intended to restrict

the City of Los Angeles in the construction of its public buildings. The court there stated at page 217:

> "It is the contention of respondent that the said charter provision is applicable alike to the city in the construction of its public buildings as to the inhabitants of said city in private enterprises. It is the contention of the petitioner that the city is not bound unless the language of the limitation is clear and unmistakable, to the effect that the city itself should be so bound, and that such language does not here appear.
>
> "We are of the opinion that the contention of the petitioner should be sustained. Under the constitution the charter of the city is not only the organic law of the city but it is also a law of the state within the constitutional limitations (Ex parte Spears, 120 Cal. 395, 399 [52 Pac. 715]; Dalton v. Delande, 22 Cal. App. 481, 487 [135 Pac. 54]; Stern v. City Council of Berkeley, 25 Cal. App. 685 688 [145 Pac. 167]. Being an enactment in the exercise of the law-making power of the state it is subject to the recognized rules of statutory construction. In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. (Marin Mutual Water Dist. v. Chemu, 188 Cal. 734 [207 Pac. 251]; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302 [19 A. L. R. 452, 202 Pac. 37]; Mayrhofer v. Board of Education, 89 Cal. 110 [23 Am. St. Rep. 451, 26 Pac. 640]; Whittaker v. County of Tuolumne, 96 Cal. 100 [30 Pac. 1016].) The rules laid down in the foregoing cases would seem to apply to the city in its present situation, and to justify the conclusion that it was not intended that the city should be so restricted in the construction of its public buildings. This conclusion is fortified by the showing, also made by the petition herein, that since the adoption of said charter provision a public library building and a new hall of justice, both in excess of 150 feet in height, have been constructed within said district without objection. While neither the overwhelming vote in favor of a new city hall of this particular height and design at the location mentioned, nor the construction of other public buildings within said district in excess of the general charter limitation, is conclusive as to the scope of said provision, nevertheless those facts shed some light on the question as to whether it was intended by the people of the city and by the legislature in adopting and approving the charter provision that the city itself should be subject to the height limitation prescribed in said section 3. We think there is not in that section such a clear and definite expression of the intention so to limit the city in the con-

> struction of its public buildings as would remove the provision from the operation of the general rule contended for by the petitioner."

While the question of whether a municipal corporation is bound by the provisions of its zoning ordinance where it is operating in a proprietary capacity has not been specifically passed upon by the California courts, there is a dictum in the case of Sunny Slope Water Co., v. City of Pasadena, 1 Cal. (2) 87, to the effect that where a municipal corporation is operating in a proprietary capacity it is not bound by the provisions of its zoning ordinance. The court stated in the Sunny Slope Water Co., case at page 98:

> "Respondent emphasizes the fact that the city is also engaged in the water business and owns and operates wells and pumps in the restricted area in other portions of the city. Most of these wells antedated the zoning ordinance, but even as to the new wells it is quite clear that the city is not bound by its zoning ordinance. (C. J. Kubach Co., v. McGuire, 199 Cal. 215 /248 Pac. 678/; Baltasar v. Pacific Electric Co., 187 Cal. 302 /202 Pac. 37, 19 A. L. R. 452/.)"

The dictum is substantiated by the distinction drawn by the California courts in other cases between the proprietary activities engaged in by a municipal corporation which are for public purposes, such as the operation of public utilities, and other proprietary activities which are not for public purposes. See Marin City etc., Co., v. Sausalito, 49 Cal. App. 78. The court there stated, in denying a rehearing, at page 83:

> "A city is never other than a public corporation, whether exercising its governmental powers or other powers, in the operation of public utilities, or acting in the quiescent state of a property owner. The fact that it is a public corporation does not determine the question whether or not its property is subject to execution. The true rule is that the property which it holds for the purpose of exercising its governmental powers or for the purpose of exercising its constitutional power to operate waterworks to supply its inhabitants with water or other like public purposes is not subj ct to execution, the reason being that to subject it to sale would interfere with the exercise by the city of some of the powers for which it was organized. On the other hand, property which it holds merely as a proprietor, devoting it to no use of a public character, such as lands acquired or held for other than public purposes and not in trust for public use, are subject to execution unless some statutory or constitutional provision forbids it."

I am of the opinion therefore that the zoning laws of a municipal corporation are not applicable to property owned by the municipal corporation in its proprietary capacity which is devoted to a public use unless the municipal corporation is included within the provisions of the zoning ordinance expressly or by necessary implication. An examination of the zoning ordinance of the City and County of San Francisco reveals no provisions making it applicable to the City and County of San Francisco either expressly or by necessary implication.

In specific answer to the two cases set forth in your request:

The property under the jurisdiction of the Department of Public Works which is intended to be used as a street cleaning unit and street repair shop will definitely be used for a governmental purpose. Therefore, the City and County of San Francisco in the use of the aforesaid property for the governmental purpose would not be bound by the provisions of its zoning ordinance.

The property under the jurisdiction of the Public Utilities Commission which is intended to be used as a bus garage and terminal will be used in a proprietary capacity but for a public purpose. I am of the opinion that in the latter case because of the fact that the property will be used for a public purpose by the City and County of San Francisco that the City and County of San Francisco is not bound by the provisions of its zoning ordinance.

Of course, an amendment to the zoning ordinance expressly making the zoning ordinance applicable to the City and County of San Francisco would change the entire situation.

Respectfully submitted,

CITY ATTORNEY

To: City Planning Commission
LSM

For added authority see
City Attorney's Opinions No. 490
September, 1931 and No. 634, December 5, 1932.

May 22, 1947.

SUBJECT: Meaning of "Average Final Compensation" under Section 165.2 of the Charter.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

REQUEST

"A question has arisen about the calculation under charter section 165.2 of 'average final compensation' of members who remain in service after completing 36 years of service, in the aggregate, subsequent to June 30, 1947, or who will have completed a greater number of years of service prior to July 1, 1947. You advised us under date of February 4, 1947 and April 23, 1947, that not more than 36 years of service could be used in calculating benefits if the completion of that number was after June 30, 1947, and that all of the service credited to an individual, should be used in calculating benefits if the service was completed prior to July 1, 1947.

"The question now is raised as to whether the 'average final compensation' shall be based on compensation earned only during years of service which are to be used in calculating the retirement allowance, and for which the member contributes, or whether we shall base it also on compensation earned in service rendered subsequent to the completion of the maximum to be used in calculating the benefit.

"For example, the 'average final compensation' might be $300.00 per month on the basis of the highest five consecutive years of service used in calculating the benefit, and $350.00 for another period of consecutive five years during all or part of which the member remained in the service after completing maximum years of service to be used. The question at issue is whether the average final compensation of $300.00 must be used or whether the $350.00 may be used as a basis for the retirement allowance.

"You are requested to give the Retirement Board your opinion in the matter."

OPINION

The phrase "average final compensation" is defined in Section 165.2 (A) of the charter as follows:

> "'Average final compensation' shall mean the average monthly compensation earned by a member during any five consecutive years of credited service in the retirement system in which his average final compensation is the highest, excluding that part of such remuneration which exceeds $500.00 per month, unless the board of supervisors shall otherwise provide by ordinance enacted by three-fourths vote of all members of the board."

It is to be noted that this definition refers to the "average monthly compensation earned by a member during any five consecutive years of credited service in the retirement system in which his average final compensation is the highest . . ."

This definition of the phrase "average final compensation", as appears in the charter itself, and limited as it is to any five consecutive years of credited service in the retirement system - refers simply and clearly just to those years when the service is credited in the retirement system and none other.

Under the illustration set forth in your request, the "average final compensation" would be calculated upon the basis of a salary of $300.00 per month based upon the highest five consecutive years of service used in calculating retirement benefits. The "average final compensation" would not be calculated upon the basis of $350.00 per month, where the five year period used in arriving at this sum was wholly or partly made up of time while the member remained in the city service after having completed the maximum number of years of service used in calculating retirement benefits.

You are thus advised in connection with your inquiry as presented.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board

NSW

May 26, 1947

SUBJECT: LEGALITY OF BILL NO. 4086 - LICENSING OPERATION OF COMMERCIAL VEHICLES

Dear Sirs:

Your request for an opinion is as follows:

"I have been directed by the Board of Supervisors to request an opinion from you regarding the legality of Bill No. 4086, amending provisions of Municipal Code relating to licensing of vehicles used for commercial purposes.

"This matter was on the Calendar of the Board for its meeting of May 12, and was put over until the meeting of May 26, 1947, by which time it is anticipated your opinion will be received by the Board of Supervisors."

O P I N I O N

The language of the ordinance under consideration clearly and unequivocally places a license tax on the operation of commercial vehicles described therein as distinguished from a license tax on ownership.

A license tax based on ownership is invalid and unconstitutional. (Cooley on Taxation, 4th Ed., Sec. 1676, p. 3383; Flynn v. City and County of San Francisco, 18 Cal. (2) 210).

The proposed ordinance is a proper regulation of the use of the streets and as such is valid and constitutional. See City of Chicago v. American Tile, etc., 118 N. E. 730; Ex Parte Kessler, 146 Pac. 113; Cooley on Taxation, 4th Ed., Sec. 1680, pp. 3386 and 3378.

In arriving at this opinion consideration has been given to the last paragraph of Section 24 of the Charter. I do not feel that the last paragraph of the section applies for the reason that the ordinance in question regulates the use of the streets and as such is a valid exercise of the police power.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors

CHA

2966

May 27, 1947

SUBJECT: DISPOSITION OF FUNDS OF DECEDENT DEPOSITED WITH COUNTY TREASURER FOR COURT ORDER

Dear Sir:

We have your request for an opinion as follows:

"Enclosed is a copy of the court's 'Order Authorizing Executor to Deposit Funds with County Treasurer' in the matter of the Estate of Adam J. Wondras, Deceased, signed by the Honorable T. I. Fitzpatrick, Judge of the Superior Court. Enclosed also was a check on the Wells Fargo Bank and Trust Co. in the amount of $77.86, payable to Thos. K. McCarthy, Treasurer of the City and County of San Francisco.

"Would you please advise me if pursuant to the said Order, I can receive the said check and to what Fund it should go to."

O P I N I O N

You are advised that you may receive the said check and I quote herewith Section 1027 of the Probate Code, which is self-explanatory, as to what disposition you should make of the money received.

"(TIME FOR APPLICATION: NOTICE: DISTRIBUTION TO STATE: DELIVERY BY PERSONAL REPRESENTATIVE: TIME TO FILE CLAIM.) Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of filing a final account. Notice of such application must be given in the manner provided in Section 1200 of the Probate Code. If the court, at the time set for the hearing of the final account, or such time thereafter to which the matter may be continued, does not distribute the entire balance of the estate remaining for distribution to known heirs, devisees or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to such known heirs, devisees or legatees.

"Whenever it appears that the estate or any portion thereof is to be distributed to the State of California because there are no known heirs or that the estate or any portion thereof is to be distributed to heirs, devisees or legatees whose whereabouts are unknown, the executor or administrator must so notify the State Controller in writing, which notice shall be served personally or by mail, at least 30 days before the application for distribution.

"If the court distributes the estate or any portion thereof to the State of California, and the distributing clause contains

words otherwise creating a trust in favor of certain unknown or unidentified persons as a class, such distribution shall vest in the State of California both legal and equitable title to the property so distributed; saving, however, the right of claimants to appear and claim the estate or any portion thereof, as in this section provided.

"(DELIVERY BY PERSON REPRESENTATIVE.) Upon the rendition of a decree of distribution, any money distributed to the State of California and not held on deposit in a county treasury at the time the distribution is made by the court shall forthwith be delivered to the State Treasurer by the executor or administrator, and all other personal property so distributed shall forthwith be delivered to the State Controller for deposit in the State Treasury.

"A certified copy of the decree of distribution and of any court orders amending the same must be delivered to the State Controller by the executor or administrator at the time of making any remittance in connection with an estate.

"No deposit of property in an estate shall be made in the countytreasury by an executor or administrator, public or otherwise, if the estate has previously been distributed to the State of California pursuant to this section, but such estate shall be transmitted forthwith to the State Treasurer or State Controller as provided in this section.

"(TRANSFERS BY COUNTY TREASURER.) If the money or other personal property belonging to an estate has been deposited in the county treasury prior to the date of distribution to the State of California, upon the rendition of the decree of distribution, any money so distributed shall forthwith be delivered to the State Treasurer by the county treasurer, and all other personal property so distributed shall forthwith be delivered to the State Controller for deposit in the State treasury. A certified copy of the decree of distribution and of any court orders amending the same, shall be delivered to the State Controller by the county treasurer at the time of making any remittance in connection with an estate as provided in this section.

"(TIME TO FILE CLAIM.) The property so distributed shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may appear in the Superior Court for the County of Sacramento and claim the estate or any part thereof. Rights of non-resident aliens shall be governed by the provisions of Section 1026 of this code. Such court shall have full and exclusive jurisdiction to determine the title to said property and all claims thereto.

"Any person who does not appear and claim, as here n required, shall be forever barred, and such property, or so much thereof

as is not claimed, shall vest absolutely in the State."

Therefore, as regards the money mentioned in your request, you are to accept it, subject to receiving a notice of the decree of final distribution, when you will forward it to the State Treasurer. Meanwhile you should place it in a special estate account.

Respectfully submitted,

CITY ATTORNEY

To: Hon. Thos. K. McCarthy,
Treasurer
City and County of San Francisco

BJW, Jr.

June 2, 1947.

SUBJECT: Effect on Chief Engineer, Fire Department, of Annual Salary Ordinance.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"On May 22, 1947, the Board of Supervisors passed for first reading The Annual Salary Ordinance, and in Section 2.8 thereof, fixing the Charges and Deductions for Maintenance for the Fiscal Year 1947-48.

Included in this Section is the provision for a charge for the Residence furnished the 'Chief Engineer', Fire Department, at $50.00 per month.

This action on the part of the Board of Supervisors is without precedent, as far as deduction of a rental charge for the Chief of the Fire Department is concerned, and it is directly opposed to the policy and intent of the Fire Commission, which, by Charter provisions, is charged with:

1. The appointment of a Chief of Department.

2. To prescribe rules and regulations for the conduct of the affairs of the Fire Department.

I would, therefore, respectfully request your opinion on the legality of the foregoing action of the Board of Supervisors, in the light of the following facts:

a. The position of Chief of the Fire Department, by Charter direction, is exempt from the provisions of Section 151 or Section 151.3 of the Charter.

b. The duties of the Chief of the Fire Department, as prescribed by rule of the Fire Commission, include the provision that he be 'charged with the special duty of superintending the extinguishment of fires', and as such fires may occur at all hours, day or night, it naturally follows that he must be in a position to promptly respond to all fires, and for that purpose it is necessary that his living

quarters be combined with his official departmental headquarters.

c. The 'residence' for which the rental charge of $50.00 per month is proposed, is a regular fire-house, and it includes quarters for other firemen, who as 'chiefs operators' are assigned for duty therein, and in it is also housed the Chief's official Fire Department automobile, which is a part of the regular equipment of the department.

d. The Chief's occupancy of the official quarters at #870 Bush Street is therefore mandatory, and the Fire Commission, in fixing the salary scale for his position for submission to the electorate at the General Election of November 5, 1946, based its recommendation upon the assumption that he would continue its rent-free use."

OPINION

This opinion will deal only with the legality of including in the Annual Salary Ordinance deductions against the "Chief Engineer" of the Fire Department for the residence furnished him. Other points raised in your request for an opinion can be made the subject of a further request if so desired.

The salary of the Chief Engineer, Fire Department, is fixed by the Charter, and not by the Board of Supervisors. (See Section 36 of the Charter.)

The Board of Supervisors has power to fix by ordinance only those salaries not fixed by the Charter. (See second paragraph Section 151 of the Charter.)

It follows therefore that if the salary of the Chief Engineer is fixed by Charter, the Board cannot add to or detract therefrom, for to do so would permit it to do indirectly what it lacks the power to do directly, namely, fix his salary.

There is a more cogent reason, however, why any charges or deductions against the Chief Engineer cannot be included in the Annual Salary Ordinance, and that is, the language of the ordinance. I quote from Section 2.8:

"The compensations fixed herein for all employees whose compensations are subject to the provisions of Section 151 or 151.3 of the Charter, etc."

Section 151 of the Charter, as previously pointed out, specifically exempts from its provisions compensations fixed by the Charter.

Therefore, deductions or charges against the Chief Engineer of the Fire Department cannot be embodied in the Annual Salary Ordinance.

Respectfully submitted,

CITY ATTORNEY

Board of Fire Commissioners

CHA

June 6, 1947

SUBJECT: ELECTRICAL CONTRACTORS - LICENSING THEREOF.

Gentlemen:

I have your request for an opinion as follows:

"Jacob Stadtner applied to the Department of Electricity for a permit to do work at 1358 Market Street. The permit was refused on the ground that the appellant does not have a license to do business as an electrical contractor in San Francisco. The appellant possesses a license granted to him by the State of California to do the type of work requested. What is the appellant's status?"

O P I N I O N

On August 2, 1946, in my opinion of that date, I advised the Chief Administrative Officer that he should continue to follow the provisions of the Electrical Code regarding the licensing of electrical contractors. This opinion was based upon the premise that the case of

Horwith v. City of Fresno, 74 Cal.App.(2d) 443,

which covered the points of law in question had not been disposed of on the merits and the judgment was not final.

Since writing this opinion, the law on these points has been definitely settled and the judgment of the Court in the above entitled case has now become final. The pertinent portion of the opinion applicable to the case referred to in your request is as follows:

"As the licensing of contractors throughout the State is a matter of general and state-wide concern we must conclude that it is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulation such as that attempted to be imposed by the city of Fresno."

Therefore, you are advised that since the applicant possesses a State license granted to him by the State of California, under the Horwith case cited above he is entitled to have a permit issued to him to perform the work prescribed.

Respectfully submitted,

CITY ATTORNEY

Board of Permit Appeals
BJH

June 9, 1947

SUBJECT: IS EXECUTION OF AGREEMENT TO SELL SEDAN PERMITS AND SEDANS OPERATED THEREUNDER, SUBJECT TO CONSENT OF POLICE COMMISSION, AN ABANDONMENT OF BUSINESS, UNDER SECTION 1079, POLICE CODE?

Gentlemen:

I return herewith the Agreement of Sale and copy of letter sent to me for study and opinion by your letter of May 9, 1947, which is as follows:

"Herewith please find copy of Agreement entered into between WARWICK D. MILLER, referred to as "Seller", and CHARLES M. WELLS, FRANK ALLEN, RALPH SYLVESTER, and WILLIAM RYAN, referred to as "Buyers", and a copy of communication dated April 3, 1947, from Mr. J. A. Pardini, Attorney for "Buyers", addressed to Mr. James G. Purcell, Attorney for "Seller".

"The Police Commission is desirous of ascertaining whether or not the contract, as manifested by the enclosed documents, is contrary to the provisions of section 1079 of the Police Code of San Francisco.

"The specific point which concerns the Police Commission is:

> Has Warwick D. Miller, shown on the records of the Police Department as permittee, by reason of the contract entered into as per enclosed documents, abandoned his business within the provisions of section 1079 of the Police Code?

"In connection with the question asked, it must be assumed that the service heretofore given by Mr. Warwick D. Miller and the De Soto Sedan Company is being continued under the supervision of the "Buyers"."

O P I N I O N

By the agreement, the seller, a holder of fifty-four certificates of public convenience and necessity and permits for the operation for hire of fifty-four sedans, agrees to sell to the buyers these certificates and permits and sixty sedan automobiles and one tow-truck. The transfer of permits is not to occur until full payment. It is then subject to the consent of the Police Commission. Until such time the status of the buyers is that of managers of the business for the seller, the seller having the right to terminate the contract upon certain grounds. These grounds include any failure to operate in accordance with the terms of the permits and all pertinent laws, rules and regulations.

The following language of the Agreement makes this clear, to-wit:

"It is specifically understood and agreed that, as to the permits for the operation of said vehicles for hire, no legal or equitable interest shall be transferred therein until said THREE HUNDRED EIGHTY THOUSAND FIVE HUNDRED DOLLARS ($380,500) heretofore referred to, is paid, in full, and that at all times until an application for the transfer of said permits to said Buyers from said Seller is made and granted, said Seller shall be the sole owner of each and every of said permits, and that there shall be no transfer of any interest, legal or equitable, to said Buyers, but that said Buyers shall have the capacity of managers of said business during all the time that the said daily payments are made payable, and provided, further, that in the event that for any reason said Buyers shall fail to make a daily payment when the same shall fall due, or fail to comply with or shall breach any other term or condition of this agreement, in said event said Buyers and each of them hereby relinquish any and all rights that they may have under said agreement, and agree to relinquish possession of those premises, herein referred to, to be leased to them, and to transfer back to said Seller. . . . . and said Buyers further agree that, any provision of law notwithstanding, in the event of any such default, without legal proceedings being had said Seller may take physical possession of said vehicles and use the same in the operation of said business.

"Said Buyers further warrant that during the entire existence of this agreement, they will operate vehicles in accordance with the terms and conditions of each of the permits heretofore referred to, and in full compliance with each and every and all of the laws, ordinances, statutes and rules and regulations pertaining thereto."

A letter of the parties has also been filed with you stating the relation of the buyers to the seller to be that of managers and agents.

The continuing responsibility and control of the permit holder for operation under the permit in accordance with the requirements of law and the rules and regulations of the Police Commission is made quite clear.

My conclusion therefore is that the execution of the contract by the permit holder was not an abandonment of the permitted business.

Respectfully submitted,

CITY ATTORNEY.

To: Police Commission

WP

June 10, 1947.

SUBJECT: INSURANCE ADJUSTER, LEGALITY OF LEVYING LICENSE TAX ON.

Gentlemen:

You have requested my opinion as follows:

"At the meeting of the Finance Committee of today (June 5, 1947) I was directed to request of you an opinion in connection with Sec. 148. Occupations., of Bill 4084, which amends Article 2, Part III, of the S.F. Municipal Code, by providing for the licensing of certain businesses, occupations and callings and the collection of license taxes therefor, as follows:

"Can a license be imposed on 'Insurance Adjusters' as provided in Sec. 148 of Bill 4084?

"It will be appreciated if your opinion may be had in time for the ensuing meeting of the Finance Committee relative to this matter, which is scheduled for next Wednesday, June 11, as a Special Order at 2 P. M., in Room 228, City Hall.

"There is attached hereto for your information in connection with this matter a copy of a 'Brief' on the legal aspects of imposing occupational license fees on 'Insurance Brokers' and 'Insurance Adjusters'. This Brief is to be returned to the Chairman of the Finance Committee when it has served its purpose to you."

OPINION.

I understand that the scope of the bill referred to is limited to independent adjusters who engage in the business of adjusting claims on behalf of whatever insurance carriers that may employ them. It is my opinion that such individuals are not agents of any insurance company within the meaning of Hughes v. City of Los Angeles, 168 Cal. 784. If they were, then it would follow that every attorney or other person who might be used by an insurance company for the purpose of conducting its business would be an agent and thus entitled to exemption from taxation under Art. XIII, Sec. 14 of the State Constitution. I do not think that such exemption was intended by that section of the Constitution.

In 2 Couch on Insurance, p. 1466 it is said with reference to a professional adjuster:

> "* * a professional adjuster, who, by reason of his technical skill and knowledge, is employed generally by any and all companies as they may need him, has a right to follow his business wherever he may deem it necessary, and the fact that he goes to another state to adjust a loss there, at the request and under the employment of an unlicensed foreign company, does not make him its agent, and subject to a penalty under a statute prescribing a penalty on agents of unlicensed foreign companies adjusting losses in the state. * *."

Thus the independent adjuster partakes more of the nature of an independent contractor rather than an agent.

A different situation would probably result where the adjuster is an employee of a given insurance company, such an individual apparently being exempt under Hughes v. City of Los Angeles (supra).

Therefore, it is my opinion that the occupation of an independent insurance adjuster may properly be subjected to the tax proposed.

Respectfully submitted,

_____
City Attorney.

To: Board of Supervisors.

cc to Hon. Roger D. Lapham,
Mayor.

GAH

June 11, 1947

SUBJECT: IS A FOSTER HOME FOR DAY CARE OF CHILDREN PERMITTED IN A FIRST RESIDENTIAL DISTRICT?

Gentlemen:

This will acknowledge receipt of your recent request for an opinion, in part, as follows:

> "The City Planning Commission respectfully requests an opinion upon the following inquiry:
>
> "Is a foster home for day care permitted in a first residential zone?
>
> "Supporting information
>
> "An interested person desires to acquire property in a first residential zone. She is married and has one child and wishes to have nine foster children for day care for which she receives $47.50 per month per child for care.
>
> "The City Planning Commission appreciates your cooperation in this inquiry."

O P I N I O N

The uses permitted in a first residential district are specifically set forth in Part II, Chapter II, Article I, Section 3 of the San Francisco Municipal Code, which provides in part as follows:

> "Section 3. First Residential District. In a first residential district no building or premise shall be used and no other building shall be constructed or altered which is arranged, intended or designed to be used for any purpose other than for:
>
> "(a) Single family dwelling;
>
> ********************
>
> "(f) The usual accessories located on the same lot with these various buildings not involving the conduct of a business ....."

It is thus clear that one cannot conduct a business of any kind in a first residential district, save and excepting for the limited use specifically allowed in the case of a musician, physician or dentist, who is allowed to practise his profession in his own place of residence.

A foster home for day care of children is, apparently, a private family home which is permitted by the State and local authorities, under license, to accept children for care during the day only, up to ten in number, and under sixteen years of age. These children will use the "Home" involved as their "Home for the Day", with all that that implies, eating one or more meals there, using the facilities there for sleeping or resting during all or part of the day etc. It is a home to which parents may take their children and board them during the day.

In the instance you refer to in your request, a lady with one child of her own wishes to operate, in a first residential district, a foster home for the day care of nine other children, for which she would receive $47.50 per month for the care of each child.

It would appear that the operation of such a foster home for the day care of children is in the nature of the operation of a boarding house for children during the day, as well as in the nature of the operation and conduct of a business; under either, or both, of these circumstances the operation of such a foster home would be permissible in a second residential district but not in a first residential district.

You are thus advised that a foster home for the day care of children is not permitted in a first residential district.

Respectfully submitted,

CITY ATTORNEY

To: City Planning Commission

June 11, 1947.

SUBJECT: ABOLITION OF POSITION IN CLASSIFIED SERVICE, FAILURE TO PROVIDE FOR IN BUDGET AS. CONTROVERSY BETWEEN SHERIFF AND SUPERINTENDENT.

Gentlemen:

I have your request for an opinion as follows:

"The sheriff has deleted two positions of Superintendent of Jails from his 1947-48 budget.

"Shortly after the budget estimates were submitted, employee representatives requested advice from the commission as to the legality of the action of the sheriff in omitting these positions, and requested information as to the civil service status and rights of the occupants of the positions. We responded that pending receipt of information from the sheriff as to the reallocation of the duties heretofore delegated to the superintendent of jails, we would be unable to advise the employee representatives as to the propriety of the deletion of the positions, or concerning the rights and status of the occupants of the positions.

"We addressed a letter to the sheriff under date of March 19 calling his attention to the provisions of the second paragraph of section 143 of the charter, and requested that he advise us officially of the abolition of the two positions and of any change in duties of the positions. We received no response to this letter and on April 10 we addressed a second letter to the sheriff requesting that he supply the information requested of him. The sheriff failed to respond to this letter.

"On May 6 we addressed a letter to his Honor Mayor Lapham advising him of the failure of the sheriff to supply information required of him under section 143 of the charter. Copies of the mentioned communications are enclosed herewith.

"The Mayor wrote to the sheriff requesting that he be informed as to whether the sheriff intends to comply with the request of the Civil Service Commission, and in response the sheriff advised the Mayor that he must disagree with the Mayor's assumption that he is withholding any information about the sheriff's department, or of any of the employees thereof from the Civil Service Commission.

"We have therefore been unsuccessful in our effort to obtain compliance of the sheriff with the provisions of section 143 of the charter.

"Positions are classified on the basis of duties and responsibilities attached to the respective positions and the training and experience required for the performance of these duties. The Civil Service Commission conducts examinations to fill the positions allocated to the various classifications, and persons and eligibles are appointed to these positions in order of their standing on the respective lists.

"The charter provides that no employee may occupy a position outside of the classification to which he has been appointed; the charter provides that the top eligible on the list of eligibles shall be certified to the position; the charter provides that no employee may be dismissed from his position except under charges for specified offenses, and only after a hearing before the appointing officer, and an opportunity of appeal to the Civil Service Commission.

"These are all basic and essential provisions of the merit system administration. The section of the charter which requires appointing officers to notify the commission immediately of the creation or abolition of positions, or any change in the duties of positions is a vital and necessary provision in the administration of a merit system. Its purpose is to assure the Civil Service Commission full and complete and valid information regarding the status of positions and allocation of duties as a basis for determining the rights of employees, and the proper classification of positions. If such vital information is withheld from the commission, the commission is effectively prevented from carrying out its functions in administering a merit system in this jurisdiction.

"The Mayor has asked the Civil Service Commission to advise him what, in the commission's opinion, is the next proper and legal step for the Mayor to take in this situation. It is the commission's most earnest desire that the sheriff supply this information which would give us the basis for determining the propriety of the action of the sheriff, and the rights and status of the employees concerned in this situation. We have no other interest or concern in the situation.

"We therefore request your advice as follows:

"1. Is the sheriff required to supply to the Civil Service Commission information concerning the abolition of these two positions and information as to whom he will delegate the duties heretofore performed by the superintendents of jails as requested in our letter of March 19?

"2. In view of the refusal or failure of the sheriff to supply this information, has the commission any power to force his compliance with the terms of the charter?

"3. What steps can the mayor take to enforce compliance by the sheriff with the terms of the charter?

"4. The sheriff having failed to comply with the provisions of section 143 of the charter, have these positions been legally abolished?"

OPINION.

As you have indicated in your request, you are asking four separate questions concerning the subject matter. For the sake of clarity I shall answer those questions in reverse order.

Question No. 4:

The sheriff having failed to comply with the provisions of section 143 of the charter, have these positions been legally abolished?

Failure to comply with section 143 of the charter will not prohibit a department head or appointing officer from legally abolishing a position. The power to abolish a position in the city and county service is not found in section 143 of the charter but in section 20 of the charter of which the pertinent and applicable section is quoted herewith:

> ". . Each department head may suggest the creation of positions subject to the provisions of this charter, and may reduce the forces under his jurisdiction to conform to the needs of the work for which he is responsible, any other provisions of this charter to the contrary notwithstanding . . . "

It is clear, then, that the sheriff under the above quoted section may reduce his force "any other provisions of the charter to the contrary notwithstanding." It must be presumed that the sheriff has acted in this matter under this section and that his abolition of the two positions referred to was made in good faith and with the purpose in mind of reducing the force of employees under him.

Since the power to reduce the number of positions is unequivocally given to heads of departments, including elective officials, by section 20, and since the sheriff comes under this category (see section 32 of the charter), I advise you that he

has legally abolished the two positions referred to.

Questions 1, 2 and 3:

The remaining questions in your request can all be summarized in one query, What is the effect of section 143 of the charter in cases involving the abolition of positions? It is readily understandable that since the civil service commission is charged with the duty of classifying and reclassifying positions in the city service (see section 141 of the charter), the commission must, at all times, have data presented to it necessary to accomplish this end. Whenever there is a change of classification involving persons or positions over which the commission has control, by virtue of section 141 of the charter, the department heads must furnish such data and information to the commission. (See section 143 of the charter). In the interest of efficiency in the city service this section must be complied with by the appointing officer. Failure upon his part to so comply will negate the existence of complete harmony and efficiency which is vital in an organization such as the City and County of San Francisco. The commission has no power to force the appointing officer to give it this information, but the Mayor by virtue of section 25 of the charter, which provides that "he shall coordinate and enforce cooperation between all departments of the city and county", has such power.

It is mandatory upon the officer abolishing or creating a position to give immediate notice of such abolition; and the Mayor is authorized to take such steps as he may deem necessary to accomplish the mandate by virtue of section 25. The facts in the present case show that in the budget estimate prepared by the sheriff, he left out any request that the board of supervisors appropriate funds to continue the two positions of Superintendent of Jails. The budget estimate, as rendered, with the above omission shown, constitutes a sufficient compliance with the provisions of section 143 of the charter. The abolition of the positions in the sheriff's department differs in this case from an abolition that might occur during the fiscal year, because under such a change as the latter, unless an immediate notice in writing is given the commission, it would not have any means of knowing of the change. But where, as in the present case, the abolition appears plainly on the face of the budget estimate the requirement of an additional written notice would be mere duplication.

Since the positions have been abolished by the sheriff and are no longer to be continued in his department, it is not necessary, nor would it be of any value, for the commission to request that he inform them of a change of the duties, since it is presumed that, with the abolition of these positions in good faith, the duties cease.

In summary, I advise you that the sheriff has fully complied with the provisions of the charter and his actions are lawful.

Respectfully submitted,

JAS. J. O'TOOLE
City Attorney.

To: Civil Service Commission.
cc to Daniel C. Murphy, Sheriff.

JJO:jr

3173

June 11, 1947

SUBJECT: EFFECT ON CHIEF ENGINEER, FIRE DEPARTMENT, OF ANNUAL SALARY ORDINANCE.

Dear Sirs:

Your request for an opinion is as follows:

"Will you be kind enough to furnish an opinion to the Finance Committee by Wednesday, June 11, 1947, indicating whether or not the fifty-dollar charge prescribed for house rental for the Chief Engineer of the Fire Department for his quarters on Bush Street, would constitute a proper charge and could properly be included within Section 2.8, assuming that the following language were deleted from Section 2.8 of the Annual Salary Ordinance:

'. . .whose compensations are subject to the provisions of section 151 and section 151.3 of the charter, and including those engaged in construction work outside the City and County of San Francisco. . .and include the valuation of maintenance provided such employees...'

"I am also calling to your attention the language appearing in Section 150 of the Charter reading:

'. . .the salary, wage or other compensation fixed for each officer and employee in, or as provided by this charter, shall be in full compensation for all services rendered. . .'

"On the basis of this section, if you are to rule that the charge is not a proper, fixed charge, would it not also be true that you are giving the Chief Engineer additional compensation, contrary to the terms of the Charter, by furnishing him with a residence for which he is not paying?

"I am also calling to your attention the fact that now, even though the Chief Engineer's salary is set by the terms of the Charter, he does pay into the Retirement System and Health Service System. If your ruling is to maintain that this charge is illegal, would not these charges as deductions from his salary also be illegal?"

O P I N I O N

Deleting the language mentioned in your request from the Annual Salary Ordinance will not delete it from Section 151 of the Charter nor change the meaning of said section. The power of the Board of Supervisors to fix salaries springs from Section 151 - that section specifically exempts compensations fixed by the Charter. Furthermore

it is fundamental that where a salary has been fixed by the people by charter amendment the legislative body cannot by ordinance provide for a salary greater or less. (McQuillan Municipal Corporations, 2nd Ed., Vol. 2, Sec. 535)

The next to the last paragraph of Section 150 of the Charter only part of which you quote in your request for opinion, when read in its entirety, and with relation to the entire Charter, I believe is subject only to this interpretation. That no officer or employee is entitled to retain fees or other monies receives by him except as provided in the Charter. (L. V. v. Bulcrevy, 15 Cal. App. 11; Lesem v. Getty, 23 Cal. App. (2d) 57.) Other emoluments or gratuities or benefits, if any, received by the officer are not within the purview of the section. Salary and compensation are synonymous terms and generally mean payment in cash. (Martin v. Santa Barbara County, 105 Cal. 268; Words and Phrases, Perm. Ed., Vol. 8, p. 193, et. seq.)

The fact that the Chief Engineer does pay into the Retirement System and Health Service System cannot affect the issue. The Charter must be construed as a whole. We cannot single out one section for interpretation without considering the import of the other sections. The salary of the Chief Engineer, Fire Department although fixed by Charter is subject to the other provisions of the Charter regarding Retirement and Health Service. The Chief having accepted his salary with the deductions therefrom for these benefits, without objection would be estopped to deny the legality of the deductions.

Respectfully submitted,

CITY ATTORNEY

To: Finance Committee
Board of Supervisors

cc Hon. Roger D. Lapham, Mayor

CHA

June 12, 1947

SUBJECT: SUBSTITUTE PROMOTIONAL EXAMINATIONS, PERSONS ELIGIBLE FOR.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Charter Amendment No. 12, ratified by the State Legislature in January 1947, adds Section 146.1 to the City Charter and provides for holding Civil Service examinations for veterans who, by reason of absence on military leave, did not 'participate' in promotional examinations.

"My attention has been drawn to the case of several veterans who took promotional examinations at their military posts but failed to qualify owing to their active and full time participation in the war effort. These veterans feel that due to lack of time and facilities, necessary in proper preparation for the examinations, they were not given the opportunity to 'participate' or share in common with the participants not in the armed services. Further, it is understood that a large share of the questions concerned the civil code of San Francisco, and that the non-availability of this code at the military posts placed an added handicap upon the veteran on military leave.

"I desire your opinion on the eligibility of veterans, who took the promotional examination and failed to qualify for it during their military leave, to 'participate' in the forthcoming substitute examinations to be held in compliance with Charter Amendment No. 12.

"As the filing date for these examinations closes June 16, 1947, it is requested that I receive your opinion not later than June 12th."

O P I N I O N

Section 146.1 of the charter which was recently adopted reads in part as follows:

"Employees under permanent civil service appointment who, because of absence on duly authorized military leave, did not participate in a promotional examination held between September 16, 1940, and the effective date of this amendment, in which examination the employee was otherwise eligible to compete, and which examination is hereinafter

referred to as the original promotional examination, shall after abridgment of military leave, have the right to participate in a similar promotional examination, subject to the provisions of this section. The provisions of this section shall not apply to employees whose military leave extends beyond six months after the effective date of this amendment."

From a reading of the above quoted portion of the section it is plainly evident that in order for an employee of the City and County of San Francisco to be eligible to take a similar substitute promotional examination under the provisions of the charter, he must possess the following four qualifications:

1. Have a permanent civil service appointment.

2. Have been on duly authorized military leave.

3. Did not participate in a promotional examination between September 16, 1940 and the effective date of section 146.1. (Jan. 7, 1947)

4. Otherwise eligible to compete.

The veterans mentioned in your request possess the first two and the last requirements but do not qualify under the third, inasmuch as they have participated between the dates mentioned in a promotional examination for the position which they are now seeking. Your request indicates that these veterans feel that they have not "participated" in any examination which would disqualify them to take the substitute promotional examination for promotive positions. The answering of questions in examination, and the submission of their papers for correction, regardless of the conditions under which the examination is given, is a sufficient participation to disqualify the applicants under this section of the charter.

Therefore, I advise you that any veteran who has taken a promotional examination while he was in the service, regardless of the conditions under which the examination was given, has participated in said examination as this term is used in section 146.1 and is not eligible under this section to take the substitute promotional examination.

Respectfully submitted,

CITY ATTORNEY

To: Fred W. Meyer
Board of Supervisors
cc: Civil Service Commission
BJW

June 12, 1947

SUBJECT: CALENDAR AND JOURNAL OF BOARD OF SUPERVISORS, REQUIREMENT THAT THEY BE PUBLISHED.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Because specifications are now being prepared looking to a call for bids for possible printing of the calendar and journal, and time is of the essence, it will be appreciated if I may have your opinion and advise in connection with the following, today:

"Section 10 of the charter provides in part: 'The Board shall cause a calendar of the business scheduled for each meeting to be published and shall keep and publish a journal of its proceedings.'

"Section 12 of the charter provides in part: 'The clerk shall keep a journal of proceedings of the board and files of all ordinances and resolutions and properly index the same. He shall be responsible for the publication, as required by law, of ordinances, resolutions and other matters acted on by the board for which publication is specified.'

"Section 13 of the charter provides in part: 'The term "published" as used in this charter shall mean publication in the official newspaper as required by charter. The official newspaper is hereby defined to be a daily newspaper of general circulation, published in the city and county and which has a bona fide daily circulation of at least 8,000 copies.'

"As you are aware, the practice in the past has not been to publish the calendar and journal in the official newspaper.

"Will you please inform me today, if possible, whether or not the language referred to above requires publication of the calendar and journal in the official newspaper. And, assuming that your answer to that question be in the negative, will you please inform me what requirement there is, if any, which requires that the calendar and journal be printed; and whether or not, if deemed desirable, the practice of printing the calendar and journal might be dispensed with and some other method for preparation of those documents be invoked such,

for instance, as mimeographing.

"I will be deeply grateful if I may have your response to this inquiry today."

O P I N I O N

The words "publish", "published" and "publication" are used with several meanings in the charter. In some of the sections the clear intent is that there be a publication in the official newspaper of the City and County of San Francisco. Section 224 provides:

> "Whenever advertising or publication is required by the provisions of this charter, it shall mean one publication in the official newspaper of the city and county, unless a greater number of publications is specifically required; . . ."

Section 13 provides in part:

> " . . . The term 'published' as used in this charter shall mean publication in the official newspaper as required by charter . . ."

However, in other sections the meaning of these words is that the matters be "disclosed, revealed, proclaimed, circulated, or made public" which is the definition of "publish" set forth in the case of In re Application of the Monrovia Evening Post, 109 Cal. 263, 264. Thus, in section 17 of the charter where the word "published" and "publication" are used the clear intent is that the code and the charter be set up in book form.

The provision of the charter that "the term 'published' as used in this charter shall mean publication in the official newspaper as required by charter" is included in section 13 which deals only with action by the board of supervisors by ordinance or resolution. The above quoted provision must therefore be restricted to that section and to other sections of the charter which refer to ordinances or resolutions so as to require the publication of ordinances and resolutions as therein set forth.

I am of the opinion that where the word "publication" is used in the charter the requirement is that there be a publication in the official city and county newspaper unless a contrary intent is manifested, but that where the words "publish" or "published" are used there is no requirement that there be a publication in the official city and county newspaper unless such an intent is manifested in the use of these words. Such intent, for example, is manifested in the following sections of the charter:

Section 72, in regard to the budget and the annual appropriation ordinance, provides:

" . . . Upon submission it shall be deemed to have been regularly introduced, and together with the proposed budget, shall be published as required for ordinances."

Section 130, dealing with public utility rates, provides:

"Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges."

As to section 10 of the charter which provides:

"The board shall cause a calendar of the business scheduled for each meeting to be published and shall keep and publish a journal of its proceedings."

there is no intent manifested that the words "publish" and "published" require a publication in the official newspaper of the City and County and you are therefore advised that the calendar and journal of the board of supervisors are not required to be published in the official newspaper of the city and county.

I know of no requirement that the calendar and journal be printed. If it is desired, some other method for preparation of those documents may be used. Whatever method be used, the calendar and the journal should be "disclosed, revealed, proclaimed, circulated, or made public" in compliance with the requirement that these documents be published.

Respectfully submitted,

CITY ATTORNEY

To: Clerk, Board of Supervisors
LSM

June 13, 1947

SUBJECT: HEALTH SERVICE SYSTEM, PROPERTY OF, IS CITY PROPERTY

Gentlemen:

I am in receipt of your request for an opinion as follows:

"Assessor Russell L. Holden has served an 'Official Demand for Declaration of Property' on the Health Service System for certain equipment located in the physiotherapy office at 1026 Market Street.

"This equipment was purchased with Health Service funds and is used to provide medical treatment for employees of the City and County and of the Board of Education.

"It is respectfully requested that you advise us as to whether or not the equipment in question is city property, or whether it is private property and as such subject to taxation."

O P I N I O N

The Health Service System established pursuant to Section 172.1 of the Charter of the City and County of San Francisco is an integral part of the government of the City and County of San Francisco. (Butterworth v. Boyd, 12 Cal. (2) 140)

Disbursements may be made only upon audit by the Controller, who exercises the same accounting and auditing powers as the Charter gives him over other municipal boards, officers and commissioners. (Charter Section 172.1, Subdivision 4)

The employees of the Health Service System are civil service employees of the City and County of San Francisco and members of the Retirement System. (Charter Section 172.1, Subdivision 3(d))

From the above it will be noted that the Health Service System is actually a department of the municipal government of the City and County of San Francisco. The funds of the Health Service System, while derived from contributions of the members of the system, are actually funds of the City and County of San Francisco held in trust by the city for the benefit of the members. It follows that any property purchased by the Health Service System to carry out the purposes for which the system is established is property of the City and County of San Francisco and therefore not subject to taxation

by the City and County of San Francisco.

You are therefore advised that the equipment of the Health Service System located in the physiotherapy office at 1026 Market Street is city owned property and exempt from taxation.

Respectfully submitted,

CITY ATTORNEY

To: Health Service Board
LSM

June 18, 1947

SUBJECT: INSUFFICIENT CERTIFIED CHECK PRESENTED BY BIDDER ON PROPOSED WORK FOR RECREATION COMMISSION.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"On Tuesday, June 17, at 2:00 p.m., in accordance with the department's advertisement for bids on the paving and floodlighting of the North Beach Playground, the Secretary of the Recreation Commission opened the eight bid proposals which had been submitted up to that time.

"The advertised invitation for proposals stated:

"'Each proposal offered must be accompanied by a certified check on a solvent bank of the State of California, payable at sight to the City and County of San Francisco, for an amount not less than ten (10%) per cent of the total amount of the proposal.' (Chapt. X, art. 2, sec. 36, Public Works Code).

"The low bidder submitted a certified check in an amount less than 10% of the total amount of the proposal. Before 2:30 p.m., a representative of the low bidder arrived at the Recreation Department offices and, upon being informed of this deficiency on the part of his firm, requested that his firm be allowed to make it up with cash.

"The Secretary was advised by Mr. Bianchi to accept the cash pending an opinion of the City Attorney on the validity of the bid submitted under these circumstances.

"It is requested that the Recreation Commission be advised as to the proper procedure to follow in awarding the contract, due to the fact that the low bidder failed to conform to the 10% requirement of the bid invitation."

O P I N I O N

On April 4, 1933, in connection with a similar matter, this office ruled as follows:

"In 3 McQuillin Municipal Corporations, 2nd Edition, p. 900, we find the following language:

"'It is frequently required that bidders for public contracts accompany their bids with a deposit or other security of a prescribed amount, as a guaranty that they will meet the requirements of their bids. Under such requirement, it is generally held necessary to the validity of the bid that the security be submitted with the bid and be of the kind designated.'

"From the foregoing language it becomes readily apparent that the rule with respect to the deposit of moneys upon the presenting of a bid is strict. Assuming a requirement of a percentage by an advertised notice calling for bids, I am of the opinion that such requirement of percentage must be exactly complied with. Otherwise it would be impossible to draw the line to determine when a deposit was sufficient or insufficient.

"I am therefore of the opinion that when a department of the municipal government requires a percentage of money as and for a deposit at least such percentage must be deposited; otherwise the bid or proposal is invalid."

In view of the foregoing, I am of the opinion that the low bidder mentioned in your request is not entitled to the contract.

Respectfully submitted,

CITY ATTORNEY

To: Recreation Commission

June 18, 1947.

SUBJECT: FORMER EMPIRE HOTEL BUILDING, CANCELLATION OF TAXES ON, AFTER ACQUISITION BY THE UNITED STATES OF AMERICA.

Dear Sirs:

I am in receipt of a request for an opinion governing the cancellation of taxes on the former Empire Hotel Building by the Board of Supervisors.

The Assessor has addressed the following letter to you:

"Receipt is acknowledged of the copy of your letter to the Controller, requesting information regarding the statement in the Press that, as a result of cancellation of taxes on the Empire Hotel Building, the City and County of San Francisco was deprived of a considerable amount of revenue.

"On December 2, 1942, this property was conveyed to the Reconstruction Finance Corporation. By Act of Congress, all R. F. C. real property is subject to local taxation. This property was assessed from 1943 on until the deed was recorded on February 17, 1947, to the United States of America, whereupon the property became exempt from taxation. During the period this property was assessed to the R. F. C., $144,178.36 in taxes accrued against this property.

"Since Congress provided for the payment of local taxes by the Reconstruction Finance Corporation, it is possible that an insistence on payment on the part of the City may have brought results prior to the action of the Board in canceling these taxes."

FACTS.

There are additional facts governing the acquisition of the former Empire Hotel Building by the United States of America which are not set forth in the above quoted letter.

A special warranty deed conveying the former Empire Hotel Building from the Reconstruction Finance Corporation to the United States of America was dated December 23, 1943. This deed was delivered by the Reconstruction Finance Corporation to the Public Buildings Administration of the Federal Works Agency on April 6, 1944, and the receipt of said deed was acknowledged by the Public Buildings Administration on April 15, 1944.

In July, 1944, the Reconstruction Finance Corporation requested that taxes subsequent to the date of transfer be canceled upon the payment of a pro rata amount of the taxes for the period from January 1, 1944, to April 15, 1944. On July 25, 1944, the Reconstruction Finance Corporation forwarded to the City and County of San Francisco a United States Treasury Warrant in the amount of $9,436.28 in payment of the pro rata amount of the taxes from January 1, 1944, to April 15, 1944. Thereafter, on August 7, 1944, by Resolution No. 4147, the Board of Supervisors canceled the second installment of the 1943-44 real property taxes on the former Empire Hotel Building.

The deed to the former Empire Hotel Building from the Reconstruction Finance Corporation to the United States of America was not recorded until February 17, 1947. For that reason taxes were assessed on the property for the years 1944-1945, 1945-1946, 1946-1947 as against the Reconstruction Finance Corporation, even though legal title to the building was in the United States of America, and the property was therefore tax exempt. These later taxes were canceled of record by the Board of Supervisors on December 2, 1946, by Resolution No. 6944 after a request by the Special Assistant to the Attorney General of the United States of America that these taxes be canceled.

O P I N I O N.

As stated above, the deed to the former Empire Hotel Building from the Reconstruction Finance Corporation to the United States of America was dated December 23, 1943, and was delivered to the Public Buildings Administration of the Federal Works Agency on April 6, 1944. Title to the former Empire Hotel Building was transferred from the Reconstruction Finance Corporation to the United States of America as of the date of the delivery and acceptance of the deed by the United States of America.(9 Cal. Juris, p. 149, Sec. 48). Therefore, as of April 6, 1944, the United States of America became the owner of the former Empire Hotel Building and the property was thereafter tax exempt.

The deed in the instant case was not recorded until February 17, 1947. However, the recordation of the deed has no effect on the transfer of title, title being actually transferred on delivery of the deed and acceptance of it. An unrecorded deed is a valid conveyance of the title as between the immediate parties thereto and as to all the world, save a subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose instrument is first duly recorded. (9 Cal. Juris, p. 206, Sec 91). Therefore, the only purpose of the recording statute is to protect a subsequent purchaser in good faith and for a valuable consideration who purchases the property in reliance upon the record of ownership.

In the instant case inasmuch as the transaction was between two governmental agencies, the Reconstruction Finance Corporation

and the Public Buildings Administration of the Federal Works Agency, acting for the United States of America, and there was little likelihood, if any, that the Reconstruction Finance Corporation would transfer the former Empire Hotel Building a second time, there was no need for immediate recordation of the deed to protect the United States of America, the purchaser.

You are therefore advised that the legal title to the former Empire Hotel Building was transferred from the Reconstruction Finance Corporation to the United States of America as of April 6, 1944, when the deed from the Reconstruction Finance Corporation was delivered to the Public Buildings Administration of the Federal Works Agency. After that date the Reconstruction Finance Corporation was no longer the owner of the former Empire Hotel Building and could not be compelled to pay any subsequently accruing taxes.

The taxes on the former Empire Hotel Building were canceled pursuant to Section 4986 of the Revenue and Taxation Code which provides as follows:

> "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:
>
> * * *
>
> "(f) On property acquired after the lien date by United States of America if such property upon such acquisition becomes exempt from taxation under the laws of the United States." * * *

While the above section states that the taxes "may" be canceled, the courts have held that this provision is mandatory and does not give the Board of Supervisors any option or discretion in the matter of cancellation of taxes. (See City of Los Angeles v. Board of Supervisors, 108 Cal. App. 655.)

You are therefore advised that the cancellation of the taxes on the former Empire Hotel Building subsequently to its acquisition by the United States of America in April, 1944, was mandatory upon the Board of Supervisors , that the Board had no discretion to refuse to cancel such taxes, and that the Board acted properly in canceling the taxes on the former Empire Hotel Building.

Respectfully submitted

JNO. J. O'TOOLE
City Attorney.

To: Board of Supervisors.
cc Assessor.
cc Controller.

LSM

June 18, 1947

SUBJECT: INDIGENT AID, RESPONSIBILITY OF RELATIVES

Dear Sir:

We have your request for opinion as follows:

"We have at hand at the present time the case of a forty-two year old woman recipient of Indigent Aid. She received relief through either the Public Welfare Department or the State Relief Administration from 1936 up until the spring of 1944 and again from September 1946 to the present time. She is feeble-minded and psychotic and is classified as unemployable. The case was discontinued in the spring of 1944 when the recipient stated that she planned to get employment and no longer wished relief. She says she supported herself from then until September 1946 through jobs as a domestic and as a chambermaid in hotels.

"Shortly before aid was discontinued in 1944, it was learned that the recipient had an illegitimate daughter who was twenty-one years old at that time. She was working as a clerk-typist for a federal government agency and was earning $186 per month. This knowledge came to our attention through the District Attorneys' Office, Bureau of Domestic Relations, as the recipient was contacting them in an effort to obtain funds from the daughter and "to obtain her custody." Upon review of the situation by the District Attorney's office, it was learned that the recipient had never cared for the daughter, that the father had made monthly payments for her care with foster parents with whom she lived from infancy and with whom she was still living at that time, and that the recipient apparently paid no attention at all to the daughter until she reached the age of about eighteen years or later, at which time she started to contact the daughter's employers, asked the Police Department to follow her daughter when she went out in the evening, and similar activities. The District Attorney's Office stated that they planned to take no action on the recipient's request for a warrant to be issued on a failure to provide charge and that they considered the recipient a dangerous person.

We would very much appreciate your opinion on the following points:

(1) Does the fact that a recipient of Indigent Aid did not provide care or support to a son or daughter during his minority eliminate or reduce the child's responsiblity for support of the parent in subsequent years?

(2) Is it proper for Indigent Aid to be granted in a case such as this when the daughter is financially able to make a contribution towards the support of her parent but is unwilling to do so?"

O P I N I O N

The courts have consistently held that although there may be a moral duty to support indigent relatives within certain degrees of consanguinity, the common law provided no way of enforcing the duty. Such duty therefore can be enforced only by statute which statutes must be strictly construed against the public body. (See Sec. 206, California Civil Code; Lawson v. Lawson, 18 Cal. App. 469; Duffy v. Yordi, 149 Cal. 140.) The courts feeling being what it is it takes very little excuse for them to hold that there is no responsibility. The fact that the recipient did not support the relative during minority might be sufficient to incline the court in this direction. No cases can be found which directly decide this point. In the case under discussion the relative's salary would seem to be insufficient to compel support for such a holding must be based on ability to support. (Sec. 206, California Civil Code). The question of ability to pay must be determined by the Board of Supervisors. (Sec. 2576, Welfare & Institutions Code). The Relatives Contribution Scale could not be used in fixing responsibility for it applies only in fixing responsibility of relatives of recipients of Old Age benefits and not Indigent Aid. But, if it were used as guide, the relative would undoubtedly have sufficient deductions to bring her net income under $155 which is the minimum net income that a relative can receive without being compelled to support a recipient of Old Age benefits.

It is not only proper but mandatory that aid be granted even though financially responsible relatives do not contribute. (Sec. 2500, Welfare & Institutions Code). The indigent's right to support by the county is not limited to cases where the indigent is without a responsible relative with ability to support, but is restricted in application only to those cases where the relative is actually supporting the indigent. (County of Los Angeles v. Frisbie, 19 Cal. 634).

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Director
Public Welfare Department

CMA

June 23, 1947

SUBJECT: CLAIM TO WIDOW'S RETIREMENT ALLOWANCE UNDER SECTION 166 OF THE CHARTER.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"The Retirement Board has directed that the pertinent facts in connection with the case of Frank P. Scollin, who died on January 28, 1944, be recited to you, to satisfy a question about the benefit payable to his widow, Mrs. Christina Scollin.

"The following facts, therefore, are submitted:

"1 - Frank P. Scollin became a member of the Police Department in August, 1907, and became a member of the San Francisco City and County Employees' Retirement System under section 166 of the charter.

"2 - According to the record, Frank P. Scollin applied for retirement on account of disability claimed to result from an incident on February 18, 1937, followed by a heart attack.

"3 - The Retirement Board retired Mr. Scollin, effective November 6, 1938 because of disability resulting from the foregoing injury.

"4 - On January 28, 1944, Mr. Scollin died, the death certificate showing the immediate cause of death as 'cardio-vascular decompensation; arterio-sclerotic heart disease and arterioscloerosis'.

"5 - On August 18, 1944, Christina Scollin, the deceased's wife, filed an application for continuation of retirement allowance.

"6 - Section 166 (c) of the Charter, as amended, effective May 17, 1935, provides for qualification for death allowance, that death must occur within three years from date of injury.

"You are requested to advise the Retirement Board whether or not the requirement appearing in section 166 (c) of the Charter, is applicable to this case, in view of the fact that the heart ailment was the cause of death, and the known presence of the ailment was first shown on February 18, 1937."

O P I N I O N

Section 166 (c) of the Charter provides in part as follows:

> "The family of any member of the department (Police) who may be killed or injured while in the performance of his duties, and who shall have died within three (3) years from the date of such injury as a result of such injury, shall receive the following benefits. . . ."

From the facts related in the request, it does not appear that Mr. Scollin died within three years from the date of an injury received while in the performance of his duties as a policeman.

Under the circumstances, Mrs. Christine Scollin, the decedent's widow, cannot claim any right to any retirement allowance under the provi sions of section 166 of the Charter.

Respectfully submitted,

CITY ATTORNEY

To: Retirement Board

MEW

June 23, 1947.

SUBJECT: Flower Peddlers - Permit must be Obtained from Police Department

Dear Sir:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"There are a number of persons in this city and county who are engaged in the business of selling flowers. Their method of procedure is to go from place to place, particularly into restaurants and taverns, and if purchasers are found in said places, the sale is consummated right then and there. These vendors have no fixed place of business. They do not sell their wares on the public streets or sidewalks. The sales are all confined within the premises referred to.

A question has arisen as to whether or not the persons referred to come within the provisions of section 132 of the License Ordinance (See page 692 of the San Francisco Municipal Code).

The case of 'In re Dees, 46 Cal. App., page 656, at page 659' would seem to indicate that they are peddlers; but section 869 of the Police Code (See page 482 of the San Francisco Municipal Code) states that it is unlawful to peddle goods, wares, or merchandise, or any article, material or substance, on the public streets, unless duly licensed to do so.

The problem, as presented to me in applying section 132 of the License Ordinance, is to determine whether or not said section 132 is limited by the provisions of section 869 of the Police Code and that said section 869, as a legislative enactment, also limits the application of the language found in the 'In re Dees' case.

You will also note that under subdivision 36 of Article 1, Part III, page 671, of the San Francisco Municipal Code, a 'peddling permit' must be obtained from the Police Department.

In recapitulation, I might state that the problem before me is this -

> Are the vendors, hereinbefore referred to, required to obtain a permit from the Police Department before they can sell their flowers in the taverns and restaurants?"

OPINION

The term "peddler", in common speech, as well as in law, has a well-understood meaning, involving the idea of itinerancy or of going from house to house, or from place to place. Words and Phrases, 2d series, Vol. 3, pp. 937-941; In re Dees, 46 Cal. App. 656. The operations of the persons described in your request for opinion bring them unquestionably within this definition.

The Police Department is vested with the authority for issuing permits for peddlers. Art. 1, Part III, page 671, Sec. 1, subdivision 36, Municipal Code.

Section 132, page 692 of the Municipal Code requires every person who peddles goods, wares or merchandise or any other article in any manner to pay a license tax of $12.00 per quarter. This section would not be limited in operation or effect by section 869 of the Police Code which makes it unlawful for any person to peddle on the public streets unless licensed to do so. The two sections must be construed together when they cover the same subject matter. In re McKeon, 9 Cal. App. 2d 223.

You are advised, therefore, that flower peddlers operating, as described in your letter, must obtain a license from the Police Department.

Yours very truly,

Chief of Police
Police Department

CITY ATTORNEY

CWA

June 25, 1947.

SUBJECT: IS A REFUSAL TO ENACT A CHARTER AMENDMENT A MANDATE OF THE ELECTORS?

Gentlemen:

You have requested an opinion as follows:

"At the meeting of the Board of Supervisors, held on June 16, 1947, the Board refused to enact Bill No. 4773 which purported to impose excise tax on the retail purchase, storage, use or other consumption of tangible personal property.

"I have been directed by Supervisor Christopher to request of you a written opinion as to whether or not the enactment of legislation similar in content to Bill No. 4773 would be contrary to the mandate of the electors as expressed in the last election, wherein they registered opposition to the imposition of a 'sales tax.".

OPINION.

Since the functions and duties of the City Attorney, as set forth in the charter, are legal in nature, I have always conceived it to be my duty, when giving my opinion as City Attorney, to confine it to the legal aspects of the inquiry submitted.

In a legal sense, a mandate is an authoritative requirement, as of a sovereign, a command, an order, a written direction by a court or judge.

Article XI, Section 8 of the State Constitution, makes provision in respect to amendment of a city or city and county charter. The amendment proposed to Section 24 of our charter was submitted to the electorate in accordance with this section of the Constitution. The Constitution gives such a proposal force only if it is adopted. It is invested with no legal force or effect if not adopted. It is a legal nullity. This form of proposal is not to be confused with a declaration of policy.

In a legal sense, therefore, the vote of the electorate to which you refer did not constitute a mandate or legal require-

ment and, hence, is not in legal contradiction to the bill prepared at the request of the Board of Supervisors or other proposed action.

Respectfully submitted,

JOHN J. O'TOOLE
City Attorney

To: Board of Supervisors
(Attention of John R. McGrath
Clerk of the Board)
cc: Hon. George Christopher

WP

July 7, 1947

SUBJECT: AUTHORITY OF DIRECTOR OF PUBLIC HEALTH OVER NIGHT CLUB CONDUCTED ON RIVER BOAT TIED TO A PIER.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

"Application has been made to this Department by Mr. Barney Gould, 262 O'Farrell Street, for a permit to operate a night club. This night club would be on a river boat, to be called SHOW BOAT, tied up to the pier at the foot of Hyde Street.

"Inasmuch as this is the first time that this particular type of application has been made to this Department, we should like your advice as to the extent of our authority in requiring compliance with night club and public eating establishment laws, including the question of fee and right of this department to waive certain requirements such as foundation that would be required in a building on shore."

O P I N I O N

The night club which will be conducted on a river boat and tied to the pier at the foot of Hyde Street would come within the provisions of Sections 460 and 466, Health Code, which may be found in the San Francisco Municipal Code. By its very construction, it is quite obvious that the provisions with respect to foundations of buildings would not apply to a river boat. However, the night club would be obliged to comply with all other requirements. I would particularly refer you to Section 454, which reads as follows:

"Regulations. The rules and regulations to be issued by said Director, shall, among other matters, provide for the following:

(a) Suitable ducts in said kitchens and elimination of obnoxious and disagreeable odors from said public eating places;

(b) Suitable hoods for ranges;

(c) Proper ventilation for kitchens and dining rooms;

(d) Basements and storerooms to be dry, clean and sanitary;

(e) Regulation of refrigeration and storage of foodstuffs;

(f) Installation and maintenance of proper sanitary plumbing;

(g) Handling, storage and dispensing of milk;

(h) Receptacles for soiled linen, use of clean linens and laundering thereof;

(i) Methods and manner of dishwashing;

(j) Collection and disposition of garbage and proper receptacles and containers therefor;

(k) Adequate toilet facilities and the location of water closets, dressing rooms, lockers and wash basins;

(l) Cleanliness of the premises, utensils and towels."

Naturally, the night club would be required to conform with the provisions of Section 462, wherein the Department of Electricity, the Bureau of Building Inspection of the Department of Public Works and the Bureau of Fire Prevention and Public Safety would inspect the night club and determine that it meets with the approval of these particular departments.

The usual license fees should be assessed against the night club.

In an appeal from the decision of the Municipal Court in the case of People v. Julia Berman, (Appellate Department No. 77), Judges Walter Perry Johnson, C. J. Goodell, and James G. Conlan, made the following observations in the written decision which was filed in this case:

"The Harbor Commission has the power to make leases in furtherance of freight and passenger business and for the accommodation of the general public and workers on the docks; but it is just as important to the patrons and the general public to have the supervision of the health and police authorities exercised over the Commission's tenants on the piers as over tenants of private property facing the docks. And to our minds the statutory provisions indicate an intent that such supervision is to be exercised over the harbor premises, as in reason it should be, by the appropriate municipal officers and in accordance with the City's lawful ordinances and regulations.

"Noxious food or milk polluted with typhoid germs, if served at a restaurant in the Ferry Building or on a pier, is as detrimental to public welfare as if served elsewhere within the City limits; and in our judgment the City charter is to be read in connection with those sections of the Political Code to which reference has been made, and which, as

we believe, make health and police supervision of the harbor premises a municipal affair in the absence of specific State regulations. While the exercise of the broad jurisdiction of the State Board of Health is not barred, yet as is said in Peo. v. Williamson, 135 Cal. 415, 420 in the concurring opinion of Judge McFarland, "The public health is not a 'municipal affair' in the sense of excluding the jurisdiction of the State over the subject. But there is a wide scope for municipal action on this subject not inconsistent with general laws."

You are therefore advised that all of the laws of the City and County of San Francisco and all the rules and regulations of the Department of Public Health would apply to the night club in question, insofar as said laws, rules and regulations could be made to apply to a river boat.

Respectfully submitted,

CITY ATTORNEY.

To: Department of Public Health

cc: Chief Administrative Officer

RJB

3784

July 9, 1947

SUBJECT: BAILMENTS--GRATUITOUS BAILEE--LIABILITY OF CITY FOR DISAPPEARANCE OF MERCHANDISE GRATUITOUSLY STORED FOR THIRD PARTY IN ROOM AT CIVIC AUDITORIUM.

Dear Sir:

I have your letter of July 7, 1947, inquiring whether the city is liable under the facts outlined by you as follows:

> "The National Association of Retail Grocers opened their exhibits in the Civic Auditorium on Sunday, June 22, and closed at 2 o'clock on Thursday, June 26. The man in charge of the Campbell's Soups asked Mr. Moore, our Assistant Superintendent, to store a load of soup cartons, and on this load they claim there were some full cartons and some cartons with a few cans. Mr. Moore and Mr. Robertson, one of the janitors, placed the truck in a room on the third floor and locked it up. On Thursday, between 11 A.M. and 12 noon, when Mr. Moore went to the room, he discovered that there was nothing but empty cartons on the truck, and so reported to the man in charge of the Campbell booth.
>
> "They made various claims as to the missing cans, and finally agreed that there was the equivalent of 26 full cases missing, to the value of $148.23.
>
> "About 1:30 P.M. on June 26th I was informed of the loss and immediately requested the Police Department to make a full investigation. In company with men from the booth, I went over the building and did not find any of the missing articles.
>
> "It is my contention that under Section 5 of the lease agreement the City is not liable for this loss. Please inform me whether, in your opinion, the City is liable."

You have attached to your letter a copy of the lease agreement and it is the standard printed form of lease agreement for the San Francisco Civic Auditorium.

O P I N I O N

It is my opinion that on the facts stated there is no liability on the part of the city to anyone for the claimed disappearance of twenty-six cases of Campbell's Soups.

Assuming that the rule of liability applicable to the city in this instance is the same as that applicable to a private corporation (Chafor v. Long Beach, 174 Cal. 478; Sanders v. Long Beach, 54 Cal. App. (2d) 651--both auditorium cases), the law is that "mere evidence of the theft of goods left in the custody of a bailee, even though they were stolen by his servant or employee, is insufficient to charge him with negligence and liability for their loss, and the burden is upon the owner to supply evidence from which it may be reasonably inferred that the bailee was guilty of negligence either in the employment of his servants or the management of his business, which negligence proximately contributed to the loss of the goods." (England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 567)

Here, assuming a theft did occur, there is no evidence that it was caused or contributed to by any breach of duty on the part of the city and in this connection it may be observed that inasmuch as the storage of the soups was apparently a gratuitous accommodation on the city's part, not called for by the lease agreement, the city was required to exercise only slight care for preservation of the stored goods. (C.C. Sec. 1846; Davis v. National Lumber Co. 22 Cal. App. 111, 113) Otherwise stated, the city would be liable only in the event it were proved guilty of "gross or wanton negligence." (Northwestern M. F. Assn. v. Pacific Co., 187 Cal. 38, 43)

Finally, as you point out, if it were conceivable that liability could attach to the city, the city under paragraph 5 of the conditions incorporated in the lease agreeme nt could look to the National Association of Retail Grocers (the lessee) to save it harmless from any claim of the Campbell Soup people, assuming they were the owners of the soup. Said paragraph 5 states in part: "The lessee agrees to save the lessor free and harmless from all claims or liability for damages of any person or persons for . . . loss or damages to property occasioned by or in connection with the use of the premises hereby rented caused by any source whatsoever."

Respectfully submitted,

CITY ATTORNEY

To: Joseph J. Phillips
Director of Property
GB

July 10, 1947

SUBJECT: ACTION BY BOARD OF PERMIT APPEALS ON MATTERS APPEALED TO IT.

Gentlemen:

I have your request for an opinion as follows:

"(1) An appeal which has been on the calendar for 80 days, a rehearing having been granted after 40 days, and an extension of two weeks at expiration of the last 40 days. The delay having been caused due to the Appellant's statement that he was adjusting the question with the FIRE MARSHAL, the FIRE MARSHAL told the Secretary of this Board that he could not make the adjustment asked for. The question being does the Board by virtue of Section 39 of the Charter vote to CONCUR or OVERRULE or can the Board drop the matter from the calendar, if so, what is the status of the Appellant.

"(2) When an Appeal lapses from no action by the Appellant can the Board drop the matter from the calendar at the expiration of the 40 day time limit and what effect does this have on the one year time limit in which Appellant has to apply for a new permit."

O P I N I O N

(1) Section 39 of the Charter deals specifically with the duties of the Board of Permit Appeals and reads in part:

> "*** After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

The Charter, being a limitation on the power of any board, it follows that the power of a board to act must be in the Charter. The above quoted portion of Section 39 indicates that the board may act in either of two ways. While it is true that ordinarily the use of the word 'may' is generally construed to be permissive, in its present use, however, since the section provides that the board may act in either of two ways, the effect of the use of the word 'may' is to make it mandatory that the board take either one or other of the alternates provided for in this section.

In the light of other portions of this section, particularly "***such board shall hear the applicant***", it is even more obvious that the action of the board is mandatory, for the section requires that the board conduct a hearing, and after the hearing, together with such investigation as they may make, arrive at a conclusion and this conclusion must be either to approve the action of the head of the department or overrule the department's action.

Therefore I advise you that the board cannot drop the matter from the calendar, but must follow the mandate of Section 39.

(2) As I have indicated above in your first question, the board would have no power to drop an appeal once the appeal was filed regardless of the reasons that the appellant might give or the failure on the part of the appellant to prosecute his appeal. However, nothing would prevent the appellant from dismissing his own appeal.

Therefore I advise you again that when an appeal lapses, the board must either concur with the ruling of the board or overrule the department's decision in order to dispose of the appeal. Since the board has no power to dismiss an appeal or drop it from its calendar, it will not be necessary to consider the effect that such action would have upon the ordinance which sets a one year time limit in which appellant has to apply for a new permit.

Respectfully submitted,

CITY ATTORNEY.

To: Board of Permit Appeals

RJWJ

3786

July 16, 1947

SUBJECT: Quorum with Reference to Board of Permit Appeals.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"The Board of Permit Appeals requests an opinion on the following question:

"Can the Board of Permit Appeals, with only three members present, hold a meeting and vote on matters before the Board. The charter states there must be four members to vote to OVERRULE a matter. By this implication, does the law require that four members be present at the meeting to constitute a quorum? Also, what is the legal definition of a quorum for this Board?"

OPINION

The Board of Permit Appeals is governed by Section 39 of the Charter with regard to the number of members required to overrule the action of another city and county office or department. The applicable portion of Section 39 reads as follows:

"After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

The Board of Permit Appeals, however, is also governed by the provisions of subsection (i) of Section 19 of the Charter which provides that a quorum for the transaction of official business shall consist of a majority of all members of each board or commission. Subsection (i) of Section 19 and Section 39 are not in conflict, but supplement each other. The Charter framers appear to have deliberately made it difficult to overrule and they just as deliberately made it easy to sustain a determination of a department. There is nothing unusual about a situation such as this, since frequently during meetings of our own Board of Supervisors there are not sufficient members present to pass emergency ordinances and the ordinances must be passed in the regular manner. Other instances may be cited.

Thus, three members only constitute a quorum of the Board of Permit Appeals and it requires the presence of three members to perform all acts of the Board except the overruling of the action of a department which is specifically governed by subsection (i) of Section 19.

In my opinion, the unambiguous, plain and clear language of subsection (i) of Section 19 cannot be overruled or changed by implication.

Respectfully submitted,

CITY ATTORNEY

To: Board of Permit Appeals

WAD

July 16, 1947

Subject: Conductors' and Bus Operators' Turn-in Time Compensable.

Gentlemen:

You advise that on May 30, a legal holiday, the timerolls of the Municipal Railway report conductors and bus operators as working ten minutes and thirty minutes, respectively, at straight time. This was in addition to the time reported for service on that day and paid for at the rate of time and a half. The railroad management stated that the turn-in time of ten minutes for conductors and twenty minutes for bus operators should be compensated only at straight time.

You have asked two questions:

1. May the railroad management report conductors and bus operators the ten and twenty minutes turn-in time as working time?

2. If question 1 is answered in the affirmative should this time be compensated at straight time or time and one-half?

OPINION

It has been recognized by the Public Utilities Commission and the Manager of Utilities that when platform men and bus operators report at carbarns for their runs there are certain duties that they must perform and require time before they may actually begin work. When their runs are completed, in the case of conductors and bus operators, they are required to report at the carbarns and a period of time is required for segregation and counting of tokens, pennies, silver, currency and transfers received during the runs, turn in these collections to the cashiers and obtain proper receipts. All of these services are performed at the carbarns and have been considered as actual time worked. Bus operators must do all the things that are required of a conductor, plus the fact that they must drive their buses to places designated as the parking places for buses, and frequently require considerable time to park the buses and then walk from the point of parking to the cashier's window where they go through the process of surrendering their receipts, as is required of conductors.

I am advised that the allowance of time to plat-

form men for the services described above is generally recognized and allowed by street railway transportation systems. It therefore appears that what is a reasonable and proper time to be granted platform men is a factual situation to be determined by the management.

Your first question is answered in the affirmative.

Your second question is answered by referring you to subdivision (E) of Section 151.3 of the charter, reading as follows:

> "Platform employees and bus operators shall be paid one and one-half times the rate of pay fixed as herein provided for all work performed on six days specified as holidays by ordinance of the board of supervisors for such employees."

May 30 is one of the legal holidays specified by ordinance that platform men and bus operators shall be allowed as a holiday. As they are paid one and one-half times the rate of pay over that provided for regular working days, and as the time in question was actually served on this holiday, platform men and bus operators should be paid for the services rendered on May 30 at the same rate of pay for which they worked throughout the holiday and are consequently entitled to time and one-half for the so-called turn-in time.

Yours truly,

CITY ATTORNEY

To: Civil Service Commission

cc Manager of Utilities

DRH

July 21, 1947.

SUBJECT: STATUTE OF LIMITATIONS ON ACTION FOR RECOVERY FOR SERVICES RENDERED BY THE CITY AND COUNTY OF SAN FRANCISCO FOR THE CARE AND TREATMENT OF PATIENTS AT SAN FRANCISCO HOSPITAL, LAGUNA HONDA HOME and HASSLER HEALTH HOME; CREDITORS' CLAIMS.

Dear Sir:

This replies to the following inquiry which you addressed to this office:

"The Department of Public Health has constant occasion to place claims against the estates of persons to whom care and treatment have been rendered by the San Francisco Hospital, the Laguna Honda Home, and the Hassler Health Home.

"It frequently occurs that such persons were not billed by this department for such care and treatment at the time the care and treatment were rendered due to the fact that there appeared no ability to pay for the same.

"In checking through the daily 'Recorder' we very frequently find that estates are being probated for such persons. In these cases it is our practice to render a claim against the estate for the cost of the care and treatment that have been furnished. It is our present policy, when submitting claims, to include only the cost of care and treatment that have been rendered to such persons within the four year period immediately preceding the date of the submission of our claim.

"We should now appreciate an opinion from your office as to our right, when submitting such claims, to include the cost of care and treatment furnished prior to four years from the date of the submission of our claim against the estate.

"It sometimes occur that after having billed persons for their care and treatment at the above named institutions, we are unable to effect collection of the bills, such bills remaining as open accounts on our records. In the event that in our daily checking of the 'Recorder,' we find estates being probated for such persons, do we have a legal right to submit such bills as claims against the estates if more than four years have elapsed since the time of the issuance of our original bill.

"You will note that in the second question the only different circumstance is that a claim was rendered at the time the care and treatment were furnished."

OPINION

It is my opinion that in submitting such claims against decedents' estates, you should render your claim for the full amount due regardless of whether the care and treatment were furnished more than four years prior to the date of filing the claim, and regardless of whether any bill you have previously submitted was rendered more than four years before the filing of the claim.

The reason for this is that the City and County has no cause of action against the patient until the patient "acquires property." (Sec. 2603, Welfare and Institutions Code;* County of Los Angeles v. Barbanell, Civ. A. 5359; Id. v. Cope (1939), Civ. A. 4406; Id. v. Jobe (1941), Civ. A. 4946.**) And until such time the statute of limitations does not begin to run.

In the nature of things it is impossible for you to know at what date the patient acquires property, that is, acquires the ability to pay for the care and treatment theretofore furnished him. Therefore you do not know when the statute began to run. Hence in order properly to protect yourself, the claim against the deceased patient's estate should be in the full amount of the reasonable value of all care and treatment previously furnished the patient.

(By reason of the wording of section 2603 the statute of limitations would probably commence to run whether you were aware that the patient had acquired property or not, and its running would probably not be interrupted by the fact that the patient at a subsequent period ceased to have any property or ability to pay. 34 Am. Jur. p. 114, Sec. 140, Limitation of Actions.)

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*Sec. 2603 of the Welfare and Institutions Code reads so far as pertinent:

"If a person for the support of whom public moneys have been expended acquires property, the county shall have a claim against him to the amount of a reasonable charge for moneys so expended and such claim shall be enforced by action against him by the district attorney of the county on request of the board of supervisors.

** Unreported decisions of Appellate Department of Los Angeles Superior Court.

Whether a bill was rendered to the patient, and, if so, its date are not material factors in submitting a claim against his estate, except that the amount of your claim would no doubt be governed by the amount of any bill previously submitted.

Respectfully submitted,

CITY ATTORNEY

J. C. Geiger, M. D.
Director of Public Health

Thru Chief Administrative Officer

GEB

July 24, 1947.

SUBJECT: Control of Leasing of Park Property by Board of Supervisors.

Gentlemen:

I am in receipt of your communication reading as follows:

"The Finance Committee at its meeting of June 25, directed that an ordinance be prepared to the effect:

That all agreements for the use of any part of the lands under its control or use of any structure on any park, square, avenue or ground entered into by the Park Department and which are required to be approved by the Board of Supervisors, under Section 41 of the Charter, shall be for the period commencing July 1st and ending June 30th, and shall be submitted to the Board of Supervisors for its consideration at least six (6) weeks before the effective date of any such agreement.

"It will be appreciated if the above ordinance may be prepared by your office at an early date for the consideration of the Finance Committee."

OPINION

Section 41 of the charter gives to the Board of Supervisors the right to approve any lease of park property entered into by the Park Commission. The Board has only the right to approve or disapprove and can add no conditions to the lease to make any lease automatically expire on July 1st of any year, or to exceed for a year would be adding conditions to the lease which might not be agreeable to the Board of Park Commissioners, and therefore you have no right to adopt any ordinance which would require such conditions to be written into a lease.

In many cases it is not feasible to make the lease for a year. It might be necessary to make it for a shorter or for a longer period and the Board of Park Commissioners would be justified in submitting the lease to you for your approval and the Board of Supervisors should exercise a sound discretion in the approval or disapproval of the lease, and if the lease were beneficial to the city it would be your duty to approve it irrespective of the length of its terms.

As I have already indicated, some leases might be made for only a month and again it might be to the advantage of the city that a lease be made for a period of years, and, therefore, I am of the opinion that the Board of Supervisors cannot enact any ordinance which would limit the term of any lease that the Park Commission might see fit to enter into.

Furthermore, it is the duty of the Board of Supervisors to give consideration to any lease that may be submitted to you by the Park Commission and you would have no right to adopt an ordinance which would provide that the lease must be submitted at any definite time before it becomes effective, bearing in mind at all times that you had a perfect right to take sufficient time to give consideration to any lease which may be submitted, to the end that you may be familiar with all the facts of the leasing.

Under these conditions, I deem it unnecessary to prepare any ordinance as requested in your communication.

Respectfully submitted,

CITY ATTORNEY

Board of Supervisors

CC - Mayor

JJO'T

2790

July 28, 1947

SUBJECT: RENEWAL OF APPLICATION FOR PERMIT WITHIN ONE YEAR AFTER REFUSAL AS PROVIDED BY SECTION 31, PART III OF THE SAN FRANCISCO MUNICIPAL CODE.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"On June 3, 1947, permit was granted to Dr. E. S. Cooper to maintain a Dog and Cat Hospital at 2433-35 Clement Street in accordance with the terms of Part II, Chapter V, Section 17 of the Municipal Code.

"Subsequently the decision of the Director of Public Health was appealed to the Board of Permit Appeals by a group of citizens in the immediate vicinity of the proposed location. After due consideration the Board of Permit Appeals reversed the decision of the Director of Public Health.

"In accordance with the terms in Part III, Article 1, Section 31, as amended, a new application cannot be filed within a period of one year from date of denial by the Board of Permit Appeals.

"On July 17, 1947, a new application was filed with this Department for a permit to establish and maintain a Dog and Cat Hospital at 2433 Clement Street by Mr. Milton Marks, attorney for the applicant, Emanuel S. Cooper, D.V.M. This application was filed on the basis of the wording of Section 31 above referred to: 'provided that when any permit is denied by reason of definite existing conditions which prevent the granting of said permit, and said conditions are removed or remedied, the one year's prohibition against a reapplication will not apply.'

"I am forwarding to you a copy of the application and asking if this Department may accept the application due to the wording which apparently conforms with the above-quoted Section 31.

"Inasmuch as it has been indicated that purchase of the property is involved and the applicant and his counsel are most anxious to have this case heard at the earliest possible date, we would appreciate an early reply."

O P I N I O N

As you state in your request, Section 31 of Part III of the San Francisco Municipal Code provides that where the Board of Per-

mit Appeals overrules the action of an officer in granting a permit, the application for a permit, nor for a like permit covering the same location, shall not be renewed nor shall the same be heard until the expiration of one year from the date of the action on the original application, with the following proviso:

> " * * * that when any permit is denied by reason of definite existing conditions which prevent the granting of said permit, and said conditions are removed or remedied, the one year's prohibition against a reapplication will not apply."

The pertinent provisions of the application presented to you which purport to bring it within the above proviso are the following:

IV

"The protest and appeal filed against said application and against the action of the Department of Public Health in granting said application was based upon the claim that the following existing conditions would be injurious to the public health, namely, the possibility that the premises were of such a character that they would permit the emission of unpleasant odors and noises in the event a dog and cat hospital should be established and maintained therein. The permit above referred to was denied by the action of the said Board of Appeals by reason of the said existing conditions."

V.

"The applicant as a part and condition of this application and as a condition of the permit if granted undertakes and agrees to remove or remedy the existing conditions above referred to in each and all of the following respects:

"(a) The applicant, subject to the approval of the Department of Public Health, will install in the premises modern, proper and adequate sound proofing to prevent the emission from the said premises of any sounds which would be injurious to the health or public welfare of the surrounding neighborhood;

"(b) The applicant, subject to and under the direction of the Department of Public Health, would make any and all necessary and adequate installations to prevent the emission from said premises of any odors;

"(C) In addition to the foregoing the applicant undertakes and agrees to make such reconstruction of the premises and to make such installations therein as the Department of Public Health may deem reasonably necessary

for the protection of the public health and welfare, and agrees further in the establishment and maintenance of said dog and cat hospital to comply with any and all reasonable rules and regulations which may be prescribed by the Department of Public Health and to comply with such ordinances as may now exist or may hereafter be established respecting the public health, safety, comfort and welfare so far as the same may be applicable to dog and cat hospitals.

"With respect to the foregoing the applicant undertakes and agrees hereby that all of the undertakings above expressed for the removal or remedying of the said existing conditions shall form a part and be a condition of any permit granted pursuant to this application, and undertakes and agrees further to execute any and all written instruments which may be prescribed by the Department of Public Health or by any other department or officer of the City and County of San Francisco for the purpose of carrying into effect and enforcing the said undertakings for the removal and remedying of the said existing conditions." (Emphasis Added)

You will note in paragraph IV of the application that the "definite existing conditions" which are stated to have caused the refusal of the permit were the possibility that the premises were of such a character that certain things would happen if the permit were granted. You will also note that the applicant has attempted to meet the provision that the definite existing conditions be removed or remedied by the statement that he agrees as a condition to the granting of the permit to remove or remedy the existing conditions above referred to.

You are hereby advised that the new application does not come within the above quoted proviso of Section 31 of Part III of the San Francisco Municipal Code for the following reasons:

1) The alleged existing conditions which caused the permit to be refused were not, in fact, conditions existing at the time the application was heard but conditions which might possibly, in the future, have come into existence if the permit were to be granted, and

2) Assuming the alleged existing conditions were actually existing at the time the original application was heard, the new application does not show that the conditions "are removed or remedied" but only that as a condition to granting the permit that the applicant agrees to take necessary steps to correct this condition. From the wording of the proviso, it is a condition precedent to filing the application and hearing it, that the conditions which caused the permit to be refused in the first instance be already removed or remedied at the time the new application is made.

You are therefore advised that the applicant may not renew his application nor may you hear it until the expiration of one year from the date of your action on the original application.

Respectfully submitted,

CITY ATTORNEY

To: Director of Public Health
LSM

July 29, 1947

SUBJECT: Termination of the war with respect to section 163 of the charter dealing with retired persons.

Gentlemen:

Mr. Charles Rockwell, as spokesman for a committee of the "Retired Firemen and Widows Association of the San Francisco Fire Department" has made certain objections to my opinion to you on the above subject of May 2, 1947. These objections are contained in a citation of points and authorities substantiating his contention that the war has not terminated and therefore section 163(b) of the Charter is not now in effect. I am obliged to inform you that I disagree with the conclusion reached by Mr. Rockwell. Before reaching this decision, I have carefully scrutinized the authorities cited by him and have in addition reconsidered at length my opinions of April 10, 1947 and May 2, 1947, relating to this matter. Mr. Rockwell has relied strongly on a letter of the Attorney General to the President dated September 1, 1945, and has quoted at length therefrom. I take the liberty of directing your attention to the following language contained elsewhere in that same letter concerning the termination of the war:

> "I think it would be appropriate for me to bring to your attention certain general considerations. I must do so, however, in terms of broad generalization, inasmuch as each of these statutes has its own history and its own purpose and interest. Any question as to the termination of an individual statute must therefore be determined in the light of the statute's history and purpose, and in the light also of the factual conditions prevailing at the time the question is raised."

In my review of the authorities, I have concluded that "termination" or "duration of the war" are phrases that have received varying interpretations. Certainly it must be conceded that in the strict technical sense, a state of war does not end until a formal treaty of peace is signed and ratified. However, it does not necessarily follow that the technical sense is always employed when the word "war" is used. As indicated by the Attorney General's letter, the purpose of the statute or enactment must be looked to in determining the sense intended.

The obvious purpose of suspending the terms of section 163(b) of the charter in time of war is to assist in making available additional manpower for the prosecution of the war of production. A person on the retired rolls of the city who might wish to aid in this direction would be subjected to possible financial loss if he did seek employment. To remove this deterrant, the limitations of section

163(b) were suspended by the people during time of war. The desirability of such suspension is self-evident -- on the one hand the termendous demands of war require accelerated production by industry which can only be satisfied by a greatly augumented supply of labor, while at the same time manpower for industry is rapidly depleted by the expansion of the armed forces.

The voters recognized that charter section 163(b) would restrain persons to whom it was applicable from entering employment that would further the war effort and therefore lifted this restraint until six months after the termination of the war. If the foregoing is the reason for the suspension of the terms of this section of the charter, then in a relatively short time after the actual fighting ceased, that reason no longer exists. The demand on industry for the implements of war disappears. Very soon, demobilization makes available again an adequate supply of manpower. There is no longer the necessity that created the demand for every available man; again I say, if this necessity was the reason the people authorized the suspension of section 163(b) of the charter, it would appear that when such necessity vanishes, it was intended that the suspension of the charter disappears with it.

To put the matter another way, the people, long before the war, decided that when an employee becomes entitled to retirement, he must limit his gainful occupation or else suffer a diminution of retirement benefits. Thereafter, in 1944, an exception was made in time of war when it would have been inimical to the interests of our country to restrict such persons from full employment.

Upon the surrender of the belligerents, and certainly within six months thereafter, it was no longer inconsistent or incompatible with the national welfare to limit the employment of persons receiving payments from the retirement system. When the normal circumstance again obtained, the people must have intended that the usual limitation on gainful occupations should revive.

The propriety of considering the intention of the voters in interpreting the words of an enactment passed by them is supported in Baumbaugh v. San Diego, 44 Cal. App. (2) 898 and in Kaiser v. Hopkins, 6 Cal. (2d) 537, 538, where it is stated:

> "It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. (Cooley on Constitutional Limitations (5th ed.), sec. 66). It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed. Such is the rule where it does not

appear that the words were used in a technical sense. (Miller v. Dunn, 72 Cal. 462 (14 Pac. 27, 1 Am.St.Rep. 67).) 'Where a word having a technical as well as a popular meaning is used in the Constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense.' The words used in a constitution 'must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted it.'"

In the foregoing case the plaintiff had been denied a veteran's exemption from taxation granted by the Constitution of the State of California. This exemption was extended only to those who had served in the armed services for at least thirty days in time of war. The plaintiff, Kaiser, had served less than that period before the Armistice of World War I, but claimed that because he had remained in the service for a considerable time after the cessation of fighting, that he had served in time of war, since no peace treaty was signed until 1921. The Supreme Court looked to the circumstance that the people had voted on this enactment and therefore sought out the intent of the voters. It was conceded that if the technical meaning of the word "war" was applied, as was done in Dooley v. Johnson, 133 Cal. App. 459, that the plaintiff was correct. The court overruled the last cited case and decided that the people intended to benefit only those who served in time of conflict and that they did not use the word "war" in its technical sense.

As the Constitution is the basic law established by the people for the government of the state, so the charter is the expression of the voters for the government of the municipality. Thus it would appear consonant with the reasoning of the Kaiser case for me to consider the purpose of the voters in suspending Section 163 (b) of the charter.

Adverting to the practical aspects of the effect of applying the technical meaning of the word "war" to this charter section, it must be remembered that the national government has entirely different purposes and needs in adhering to and employing the technical sense of the term. The existence of many of the powers of the executive and even the military depend on the continuance of a technical state of war. The subjugation of the enemy is not completed by his surrender. The "war" must continue in order to prepare for the ultimate treaty of peace. No such considerations exist with relation to the administrative problems of a municipality. The dislocation and extraordinary measures dictated by the necessities of war are conditions that should endure only as long as the war requires they exist. When the actual conflict is over, when the

population of the municipality has in fact returned to its peacetime routine, the existence of a technical state of war is of no real significance in municipal or every day affairs, and therefore in the popular sense, the war is in fact over.

In addition, it should be noted that the possibility exists that it will be many years before the treaties of peace will be signed with all of the enemy belligerents. Surely it would be a difficult and unreasonable position, to maintain that the voters contemplated or intended that this war clause of the charter was to remain in effect for years after the reason for such a clause had disappeared.

You are therefore advised that the war is over within the meaning of Section 163 (b) of the charter, and that subsection is again in effect.

Respectfully submitted,

CITY ATTORNEY

Retirement Board

GAH

August 6, 1947.

SUBJECT: Declaration of Policy in re Sale of Unused Real Property.

Gentlemen:

You have made the following request for a declaration of policy:

"Pursuant to direction of the Judiciary Committee of the Board of Supervisors, you are hereby respectfully requested to draft in proper form and return to said Committee a Declaration of Policy which will present to the voters a question in substantially the following form:

"'Shall the Departments under the jurisdiction of the City and County of San Francisco, the Public Utilities Commission and the San Francisco Unified School District, dispose of all properties not now being used or intended for use for public purposes?'"

OPINION

Section 179 of the Charter provides for the submission to the electorate of declarations of policy. The sole authority of the Board of Supervisors in this regard is set forth in this section.

The section does not authorize the Supervisors to submit to the electorate a declaration of policy as to any matter which they may not enact by ordinance. The question then is whether the Board of Supervisors could enact an ordinance or ordinances requiring disposal of property by departments of the City and County and the School District as stated in your request. I assume your request refers to real property.

As to the real property of the School District, its sale is controlled by Section 18601 and other sections of the Education Code. Its sale is within the jurisdiction of the governing body of the School District. The Charter confers certain powers on the Board of Education as such governing body "in addition to the powers conferred by the general laws of the state." (See Charter, Section 135) The Charter cannot and does not limit the powers vested in the Board of Education by general law, either as to the sale of real property or otherwise. Neither can the Board of Supervisors do so by ordinance nor the electorate by declaration of policy.

As to real property under the control of city and county departments, Section 92 of the Charter prescribes the procedure for sale. From this section it appears that the Board of Supervisors may authorize such

sale only "on the recommendation of the officer, board or commission in charge of the department responsible for the administration of such property."

Initial policy making as to sale is invested by the Charter in the officer, board or commission in charge of the property and is not a subject of ordinance of the Board of Supervisors. It may not therefore be submitted by the Supervisors to the electorate by declaration of policy.

For these reasons, I am unable to comply with your request.

Respectfully submitted,

CITY ATTORNEY

Board of Supervisors

cc - Mayor

WP

August 6, 1947

SUBJECT: SCHOLARSHIPS; RIGHT OF ART COMMISSION TO ESTABLISH

Gentlemen:

This office is in receipt of your request for an opinion as follows:

> "I inclose a letter from Commissioner Born of the Art Commission which entails a suggestion for the expenditure of funds allotted to the Art Commission in the 1947-1948 budget.
>
> "Would you be so kind as to advise the Commission in writing, prior to its next meeting which will occur on July 9, 1947, as to whether or not in your opinion the plan suggested by Mr. Born would be within the legal powers of the Commission under its appropriation?"

O P I N I O N

Section 46 of the Charter regulates the powers and duties of the Art Commission. In part it provides as follows:

> "The Commission shall supervise and control the expenditures made by the Board of Supervisors for Music and the Advancement of Art and Music."

The intent of the framers of the Charter was undoubtedly that expenditures for the Advancement of Art were to be made only in those instances when the people of San Francisco in general would benefit thereby. While it is true that your proposed plan is a worthy one and may be a step toward the Advancement of Art, nevertheless it is a fundamental rule of constitutional law no longer requiring the citation of authorities that municipal funds can be appropriated only for municipal purposes. Under your plan a vast body of the citizens would receive no benefit whatever, while, on the other hand, one or a very few artists would receive a liberal education at the expense of the taxpayers. This would not be a sufficient public purpose to authorize the expenditure.

It has previously been held by this office that the symphony orchestra could not perform outside the City limits at City expense, (See Opinion No. 3608, 1944 Series, and Opinion No. 3760, 1946 Series.) for the reason that it involved an expenditure of public funds for other than a public purpose.

You are advised therefore that your Commission cannot appropriate funds for the establishment of the proposed scholarship plan.

Respectfully submitted,

To: Art Commission

CHA

CITY ATTORNEY

August 7, 1947

SUBJECT: REVISION OF CLASSIFICATION AND PROMOTIVE POLICY IN DIVISION "F" - ENGINEERING SERVICE, POWER OF CIVIL SERVICE COMMISSION TO ADOPT; NO VESTED RIGHT TO TAKE PROMOTIVE EXAMINATION.

Gentlemen:

I am in receipt of a letter from the Technical Engineers', Architects' and Draftsmen's Union, wherein you were requested to obtain an opinion from me. The letter reads as follows:

"This organization requests your committee to obtain an opinion from the City Attorney on the question listed below. So that the question might have more meaning, a general background of the situation is given as follows:

"In the past, there has been no differentiation between the City's engineering employees except in their classification titles such as Draftsman and Engineer. The succession, through promotional examination, has always been from Draftsman to Engineer. There has been absolutely no other distinction made between the two classifications insofar as opportunity for promotion was concerned. The Civil Service Commission on April 9th, 1947, adopted a Revision of the "F" Classifications, and in doing so divided the "F" Classifications into two groups, namely:

"'Technical' for Draftsman, and
"'Professional' for Engineers

"Under this division of personnel, incumbent employees in the 'Technical' group will be given only ONE opportunity to promote themselves to the Professional Group. If an applicant should fail to pass the forthcoming examination, his promotional opportunities cease. Therefore, the 'Technical' group would not continue to enjoy the promotional opportunities that they and their predecessors have enjoyed heretofore.

"The right of the Civil Service Commission to determine the promotional relation between any positions is not questioned, but after having done so and having established such policy over a period of many years, the right of the Commission to suddenly change this policy, thus restricting the promotional opportunities of incumbent employees, is questioned. It is to those incumbent employees only that the questions proposed herein refer. It is felt that any consideration of the following questions should include the fact that many incumbent employees chose City ser-

vice as a career, and have since remained in such service because of the possibility of advancement through promotion, and that any change of policy adversely affecting these employees is not only morally unjust, but in direct opposition to the fundamental concepts of the merit system of government.

"You are respectfully requested to ask the City Attorney for an opinion on the following question:

> "Can the Civil Service Commission legally restrict the promotional opportunities of incumbent employees, after such opportunities have existed by virtue of Commission policy for many years?

"As may be readily noted, the course adopted by the Civil Service Commission in regard to future policy in this matter is of extreme importance to members of this organization."

O P I N I O N

In the preparation of this opinion consideration has been given to the report of the Personnel Director and Secretary of the Civil Service Commission upon which the Civil Service Commission based its Revision of Classifications and Promotive Policy in Division "F"-Engineering Service. This report indicates that the request for the change was initiated by the Director of Public Works and that on October 16, 1946 a committee composed of the Director of Public Works, the City Engineer, the Manager of Utilities and the General Manager of the San Francisco Water Department was appointed to consult with the Civil Service Commission on the matter. The report further indicates that on February 11, 1947 a meeting was held with representatives of the engineering employee group wherein certain recommendations were made by the employees. A preliminary report was presented to the Civil Service Commission on March 26, 1947. The Commission ordered the matter posted and interested groups were asked to submit their views. Thereafter, communications were received from various groups and consideration was given by the committee to their suggestions. Thereafter, a report was made to the Civil Service Commission which, on April 9, 1947, adopted the Revision of Classifications and Promotive Policy in Division "F"-Engineering Service.

Pursuant to the revision there was established a professional engineering class group consisting of five levels of engineers as follows:

Junior Engineer
Assistant Engineer Grade 1
Assistant Engineer Grade 2

Engineer
Senior Engineer

There also was established a technical engineering class group consisting of:

Junior Draftsman
Draftsman
Senior Draftsman

and classes of:

Public Works Inspector
Surveyor's Field Assistant
Instrument Man
Chief of Party

The revision also provides that the minimum requirements for entrance to examinations in the professional group be a college degree in engineering or registration as a civil engineer in the State of California, or such other professional registration as may be provided in the future by the State of California to designate professional engineers.

The recommendation as to promotive examinations which was adopted by the Civil Service Commission was the following:

> IT IS FURTHER RECOMMENDED that hereafter open and promotive examinations be held simultaneously for the various levels in the professional group; provided, however, that permanent civil service employees in the technical group be allowed to take the first series of examinations for positions in the professional group on a promotive basis; that the promotive lists be adopted first and have priority over the entrance lists; that thereafter, permanent civil service employees in the technical group be permitted to participate in examinations in the professional group only when they meet the minimum requirements established for entrance to the examination.

The result of the adoption by the Civil Service Commission of the Revision of Classifications and Promotive Policy in Division "F"-Engineering Service is that employees presently in the technical engineering group will have the opportunity to take but one series of examinations for promotion to the professional engineering group. Should any such employee fail to pass such an examination, he will have no further opportunity to advance from the technical group to the professional group upon a promotive basis.

Your specific question is whether, as to any employees presently in the city service, the Civil Service Commission may adopt a policy

concerning promotive examinations which policy will result in restricting the opportunities of such employees to take promotive examinations.

The action of the Civil Service Commission in the instant case in adopting Revision of Classifications and Promotive Policy in Division "F"-Engineering Service was taken pursuant to Section 146 of the Charter which provides that:

> "Whenever it deems it to be practicable, the civil service commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate, and shall in addition, give consideration to ascertained merit and records of city and county service of applicants."

Regarding this section the Supreme Court of the State of California in the case of Allen v. McKinley, 18 Cal. (2d) 697 at page 704 stated:

> "The Commission, under the charter provision here involved, has wide discretionary powers in determining what groups shall be included, within the class permitted to take a promotional examination, and what the qualifications of those desiring to take the examination shall be." (Emphasis added)

The Civil Service Commission, therefore, under Section 146 of the Charter has wide discretionary powers in determining the promotive policy to be adopted in the departments of the City and County of San Francisco. The courts will not review the action of the Civil Service Commission in such matters except upon a showing of abuse of discretion on the part of the Civil Service Commission. After a review of the above mentioned report which indicates the consideration given to the change in promotive policy by the committee and the Civil Service Commission and the purpose for the change, I do not believe it can be said that there was an abuse of discretion on the part of the Civil Service Commission in adopting the Revision of Classifications and Promotive Policy in Division "F"-Engineering Service. It is my opinion in view of the foregoing that the employees in the technical engineering class group do not have a vested right to take promotive examinations which could in any way restrict the power of the Civil Service Commission to adopt the aforementioned promotive policy in Division "F"-Engineering Service pursuant to Section 146 of the Charter.

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Judiciary and Civil
Service Committee
Board of Supervisors

LSM

August 7, 1947.

SUBJECT: ONE APPLICANT TAKING EXAMINATION - COMPETITIVE CIVIL SERVICE TESTS - INTERPRETATION OF TERM "COMPETITIVE."

Gentlemen:

This office is in receipt of your request for an opinion reading as follows:

"We desire your advice concerning the interpretation of section 145 of the charter, the first sentence of which reads as follows:

"All applicants for places in the qualified service shall submit to tests, which shall be competitive ***."

"There have been a number of instances in the recent past where only one person applied for an examination or presented himself for an examination. In some of these cases only one qualified application was filed, in others, more than one applicant qualified but only one reported for the examination.

"Several years ago we had oral advice from your office that the commission could proceed with an examination under such circumstances and if one candidate in the examination attained a minimum passing mark fixed for inclusion on the list of eligibles, the adoption of such a list of eligibles containing the name of only one eligible, was legal.

"We call your attention to other provisions of section 145 of the charter which provide that the commission shall be the sole judge of the adequacy of the test to rate the capacity of applicants, and that the commission may for each examination establish a passing mark and determine the total number of persons who shall constitute the list of eligibles.

"In every instance the examination has been advertised as provided by the charter and every effort has been made to obtain widespread publicity so as to attract numbers of applicants.

"If we are now prohibited from proceeding with an examination for which only one qualified applicant is eligible, or only one qualified applicant presents himself for the examination, we will be unable to supply the examination needs of the municipal government.

"Will you kindly advise us if we may proceed with the holding of these examinations where only one person qualifies or presents himself for examination."

OPINION.

The fundamental principles underlying competitive civil service tests are expressed in section 140 of the charter wherein it is provided:

> "All appointments in the public service shall be made for the good of the public service and solely upon merit and fitness, as established by appropriate tests, without regard to partisan, political, social or other considerations."

The competitive test required by section 145 is the mode best adapted to accomplish these objectives.

The cases which have considered the term "competitive", as used in basic laws requiring such tests for establishing eligible lists for positions in civil service have generally defined it as that type of test which employs an objective standard or measure in determining the applicant's merit or fitness as distinguished from the non-competitive test where purely a subjective standard is used and where politics, partisanship and friendship may play their part.

Illustrative of these cases is the case of FI[illegible] v. [illegible], cited in 270 N. Y. 356, 1 N. E. (2d) 462, wherein the court construed the term as used in the State Constitution which required competitive tests as a condition for entrance into the civil service. The court held:

> "A civil service test or examination which conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed by other examiners of equal ability and experience is 'competitive' within the civil service law."

It is implicit in the decisions that in such tests all qualified persons shall be given the opportunity to compete but there is no requirement that more than one actually compete.

In the case of [illegible] v. CIVIL SERVICE COMMISSION, cited in 177 N.Y. 1, the Civil Service Commission of the City of Boston gave notice of promotional competitive examination. The petitioner,

with four others, applied to take the examination but only the petitioner presented himself for examination at the time and place fixed. He was told that no examination would be held. Timmins then petitioned for a writ of mandamus to compel the holding of the examination. The court held:

> "A civil service commission is not bound to examine a single applicant where it is required by its rules to certify three names of persons qualified by examinations, but whether it shall proceed or shall make a new provision for examination rests in its discretion."
> (Underscoring ours).

Section 140 of our charter provides that the Civil Service Commission is charged with the duty of providing qualified persons for appointment to the service of the City and County. Section 141 provides that the Commission shall be the employment and personnel department of the City and County and shall determine appointments on the basis of merit and fitness as shown by appropriate tests. Section 145 gives the Commission a discretion in determining the total number of persons who shall constitute the list of eligibles.

In view of the foregoing court decision and charter provisions, it is the opinion of this office that where an objective standard of merit and fitness has been established for a test and all qualified persons have been given the opportunity to compete, the test is competitive within the meaning and intent of the term as used in the charter, and the commission may proceed with the test even though only one applicant qualifies or appears.

You are therefore advised that it is the opinion of this office that you may proceed with the holding of such examination where only one person qualifies or presents himself for examination.

Respectfully submitted,

JOHN J. [illegible]
City Attorney.

CIVIL SERVICE COMMISSION.

JJ

August 8, 1947

SUBJECT: RESIDENCE; EFFECT OF CHANGE ON RIGHT TO OLD AGE BENEFITS.

Gentlemen:

Your request for an opinion reads as follows:

"May we request your opinion with regard to the residence status of Mrs. Genevieve R. Danforth, who is at present in Rexburg, Idaho, and for whom a guardian was appointed by the Probate Court, Madison, Idaho, on Jan. 4, 1947.

"Mrs. Danforth has been in receipt of Old Age Assistance since Aug. 1, 1946. She alleged at the time of the initial investigation that she had resided in San Francisco continuously since 1938. Through a reference, residence was verified from 1940 to 1946. It has been established through the S.S.X. that she received no public or private assistance prior to the granting of O.A.A.

"In September 1946, Mrs. Danforth went to Idaho to visit relatives. On Thanksgiving Day, her scheduled date of return to California, she was rendered incompetent by a stroke. We quote from a letter received from the Idaho Department of Public Assistance dated July 26, 1947:

"'Regarding the Idaho residence of Genevieve R. Danforth we have nothing new to offer over that information which was reported to you in our letter of April 5, 1947. By checking with Mr. Gordon D. Wright and neighbors who saw her, we have found that Mrs. Danforth first came to Idaho to visit with Mr. Wright during the latter part of September 1946 with every intention of returning to California, which state she has considered her home. Shortly after coming to Idaho, Mrs. Danforth went to the state of Washington where she visited for one week with a niece, then returned to Mr. Wright's home to continue her visit. It was her plan to leave for California, by train, on Thanksgiving Day 1946, but on that day suffered a severe stroke which affected her mentally as well as physically and she has since been unable to manage her own affairs. Because of the stroke she did not return to California as planned and it has been necessary for Mr. Gordon D. Wright to supervise her care at the Porter Sanitarium at Idaho Falls, Idaho, where she is now a patient. Apparently Mrs. Danforth had brought money with her to Idaho which she deposited in the bank in Rexburg, Idaho to use to meet her expenses while here. The balance of her money was deposited in

the bank at San Rafael, California. As far as we have been able to determine it was not Mrs. Danforth's plan to establish residence in Idaho. In the guardianship papers we note only the statement that Mrs. Danforth is shown to be an inhabitant of Rexburg, Madison County, Idaho. Mrs. Danforth is now mentally incompetent to state what her plans were before her illness.'

"Mr. Wright, her guardian, has requested the Idaho Department of Public Assistance to make arrangements for her return to California.

"Since May 1947 her O.A.A. has been suspended pending determination of her eligibility status with respect to personal property and residence. It has been established that her assets are now less than $600; however, before releasing her checks we should like your opinion as to whether her California residence was lost at the time that she was declared incompetent and Gordon D. Wright was appointed the guardian of her person and estate by an Idaho court. We realize that after a person has been declared incompetent and a guardian has been appointed, the incompetent person cannot be considered competent for the purpose of exercising intent as to residence and that such intent can be exercised only by the guardian. Our question is whether or not the action of the Idaho court itself caused Mrs. Danforth to lose residence in California which residence could then only be re-established by union of act and intent and through the physical presence of Mrs. Danforth in California and the intent of her guardian to make California her residence.

"Inasmuch as Mrs. Danforth from the standpoint of personal property was eligible for Old Age Assistance as of July 1, 1947, and since her July warrant has been held and in order to be released to her if she is eligible for it from the standpoint of residence, an action must be taken by July 31, 1947, we would very much appreciate your advice by telephone as to whether or not in your opinion Mrs. Danforth retains California residence."

O P I N I O N

Residence entails more than the physical presence of the person. There must be, on the part of the person whose residence is being determined, an intent to make a particular place his home. When a residence is once established the presumption of its continuance follows until a contrary purpose is manifested by an actual removal with the intention of remaining permanently away. (41 Am. Jur. 699 - Restatement of the Law of Conflict of Laws, Sec. 18)

Temporary absences with the intention of returning do not terminate a residence. (supra)

In the light of the foregoing authorities as well as the intent of all the Sections concerning residence in the Welfare and Institutions Code, it seems clear that Mrs. Danforth's residence was in California and such residence was not terminated by her temporary absence from California.

One other question remains. Did the fact that a guardian was appointed for her by the Courts of Idaho because of her incompetency change her residence from that of her State to that of Idaho, the residence of her guardian. The law is clear on this point also. In order to deprive the incompetent of the privilege of making his own choice of residence, there must be a complete loss of volition, free will and power of choice. (48 Corpus Juris p. 454, Sec. 50; 30 A.L.R. 607)

It does not appear in the letter from the Idaho Department of Public Assistance that Mrs. Danforth is insane. On the contrary, the letter indicates that she is merely incompetent. This latter condition does not necessarily include complete madness. Therefore, if she has lucid intervals she is still capable of choosing her residence. (Hayward v. Hayward, 65 Ind. App. 440)

To sum it up the residence of an adult person who becomes mentally incompetent remains the residence which he had when he became incompetent and the guardian cannot on his own motion change said residence. (See: 30 A.L.R. 607 and cases cited therein)

You are advised therefore that Mrs. Danforth retains her California residence.

Respectfully submitted,

CITY ATTORNEY

To: Public Welfare Department
CHA

August 13, 1947

SUBJECT: STREETS - RESOLUTION OF BOARD OF SUPERVISORS AUTHORIZING A CHAIN ACROSS.

Gentlemen:

We have your request for an opinion as follows:

"I have been directed by the Streets Committee to request you to prepare and submit to the Streets Committee a legal opinion on the following:

'Did the Board of Supervisors perform a legal act in adopting Resolution 6277 (Series of 1939) 'Granting permission, revocable at the will of the Board of Supervisors, to Fred W. Kolb to place a chain across a portion of Macondray Street along the east line of Jones Street?'"

OPINION.

The decisions are in considerable conflict as to what regulations may be imposed by local authorities with reference to the use of public streets, due mainly to differences in factual situations, but it is generally held that such regulations cannot impair or interfere with the general rights of the public in the use of the street and the particular rights or easements especially enjoyed by abutting property owners on the street unless it be through the reasonable exercise of the police power. The easements particularly enjoyed by abutting property owners have been generally defined to be the easements of access, light and air.

With reference to the exercise of the police power on problems affecting the public streets, California Jurisprudence, Volume 19, page 71, provides as follows:

"Ordinances regulating the use of streets must not be unreasonable or discriminatory and must not be in conflict with the general laws. Such ordinances are referable to the police power. This power is elastic and may be so extended as to meet the exigencies or new conditions arising from time to time. The exercise of the police power is subject to no restraint other than its crystallization into practical or concrete application must be reasonable, and what is a 'reasonable' exercise is dependent upon the character or nature of the conditions to be met or overcome."

In the case of Simpson v. City of Los Angeles, reported in 4 Cal. (2) 80, the Board of Supervisors of Los Angeles completely closed Olvera Street to vehicular traffic. It was found by the Board, among other things, that the highest use to which the property could be put was for pedestrian traffic and that the use of the street for through vehicular traffic was neither necessary nor convenient for the purpose of arriving at any stated destination, and further that the street was used principally for the all day parking of commercial vehicles which prevented any substantial use by the plaintiff or her lessees of the Olvera Street entrances to her property by vehicular ingress or egress.

The court held that if the constitutional limits of the exercise of police power have not been transcended, that is, if there be any rational basis for its exercise in the particular case, the motive actuating the legislative body becomes immaterial and not a proper subject of inquiry, and the court will not substitute its judgment for that of the legislative body. The court found that the exercise of the police power in this case had a rational basis of fact.

In the instant problem the factual situation as set forth in the resolution appears to be as follows:

A certain portion of Macondray Street, an unaccepted street, is paved. There is a no parking day or night sign on the street. The only beneficial legal use that can be made of the paved portion is by Mr. Kolb as a means of vehicular access to his property. The general public and the other abutting property owners cannot effectually use this portion of the street for any legal purpose due to the topography of the balance of the street which is unimproved. Despite the no parking prohibition commercial and private vehicles have used the paved portion of the street for parking and have thus obstructed the property owner's legal right of access to his property. In consideration of these facts the Board has granted the property owner the right to maintain a chain across the entrance of the driveway to ensure his legal right of access to his property. The chain does not interfere with pedestrian traffic in any way.

Based on this factual situation the Board's action does not appear unreasonable or discriminatory nor in conflict with the general laws or our charter either in the exercise of the power or the mode adopted. It created no new property right in the property owner but merely gave him a means of protecting his already existing property right of access. The action was not directed at any legal property or other right of the general public or the abutting property owners but at the illegal parking and there is no showing that the legal rights of others have been impaired or invaded. This was not a legislative act required by the charter to be in the form of

an ordinance and the matter could be properly handled by resolution. It is special and temporary in its nature and does not prescribe a permanent rule of conduct or government. In its form the license is a mere privilege, revocable at the will of the Board, and in its effect it is an aid in the enforcement of the parking laws.

The chain in the situation presented here does not constitute an obstruction within the legal intendment of the word as used in the Charter and the Municipal Code. An obstruction in that sense implies two concepts, a material object or structure and the effectual blocking of the exercise of a right by the said object or structure. Here the obstruction from a legal standpoint is rather in the illegal parking than in the practical expedient authorized to prevent the obstruction.

You are therefore advised that it is the opinion of this office that on the facts presented it cannot be said as a matter of law that the Board acted unreasonably or without and in excess of its authority in the matter; however, if it can be demonstrated as a matter of fact now, or in the future, that the chain interferes with or impairs any legal rights of the public or the property owners on the street, the matter should be reconsidered by the Board with a view towards a revocation of the license.

Respectfully submitted,

JR[illegible].J.[illegible]

City Attorney.

Board of Supervisors.

cc to Hon.Roger D.Lapham,
Mayor.

TJB

August 8, 1947.

SUBJECT: Referendum of Purchase and Use Tax Ordinance by Submission of Declaration of Policy or Repeal Ordinance.

Gentlemen:

Requests have been made of me for opinion as to the legality of referral to the electorate of the Purchase and Use Tax Ordinance by either of two proposed methods, (1) a declaration of policy for the repeal of the ordinance, or (2) a proposed ordinance repealing it.

OPINION

The power of legislative referral by the Board of Supervisors or any number of them is set forth in Section 179 of the Charter. Neither the Board of Supervisors nor any of its members has power to refer legislation to the electorate except as set forth in that section. Article XI, Sections 8 and 8½ and Article IV, Section 1 of the State Constitution give the electorate the right to make such provision and they have done so in this section of the Charter. See these sections and GALINDO v. WALTER, 8 Cal. App. 234.

Section 179, as originally enacted, provided for legislative referral of any ordinance which the Supervisors were empowered to pass. No other limitation was expressed.

The same was true of declarations of policy. The only restriction expressed as to declarations of policy was that the policy submitted for approval be one which could be the subject of ordinance by the Board of Supervisors.

In 1935, however, the electorate amended Section 179 of the Charter. The amendment inserted the fourth and fifth paragraphs of the section as it now stands.

The fourth paragraph provides procedure and effect of referendum at the option of the electorate.

The fifth paragraph prohibits the application of referendum as to numerous subjects. This paragraph is important and is as follows:

> "Annual budget and appropriation ordinances, supplemental appropriation ordinances, the annual salary ordinance, or ordinances amending the same, the ordinances levying taxes, any ordinance appropriating money from the emergency reserve fund, ordinances authorizing the city attorney to compromise litigation, and ordinances necessary to enable the mayor to carry out any of the powers vested

in him in the case of a public emergency as defined in section 25 of the charter, ordinances enacted pursuant to section 219 of the charter, as well as ordinances relative to purely administrative matters, shall not be subject to referendum."

The language of the prohibitory paragraph applies quite generally to legislation in relation to the fiscal and administrative procedure of the City and County and also to that in aid of the emergency powers of the Mayor. Referendum of the ordinances levying taxes is specifically prohibited.

The questions thus arise, (1) are these methods of referral by the Board of Supervisors or its members to be included in the meaning of the word "referendum", and (2) is this an ordinance "levying taxes", within the meaning of this paragraph.

1. Referendum, as used in this paragraph, is not limited to referendum at the option of the electorate. It includes all forms of referral to the electorate.

In the case of WHITMORE v. CARR, 2 Cal. App. 2nd 590, the term "referendum" was held to include a referral by three members of the council, under a section of the charter of Oakland similar in substance and identical in number to ours. The case states as follows:

> "The procedure for exercising the power of referendum, in so far as this case is concerned, is prescribed by section 179 of article XXII of the charter, as it stood in 1919, which is as follows:
>
> "'Any ordinance which the council is empowered to pass may be submitted by an affirmative vote of three (3) of its members at a general municipal election only, subject to the provisions of this article so far as applicable.'
>
> "By this provision there is vested in three members of the council, concurring, the right to invoke the power of referendum upon any ordinance passed by the council, and which, without the referendum being invoked, would become effective as an ordinance."

Thus it is clear that referendum includes, not only referral of an ordinance at the option of the electorate, but also by act of the legislators.

As to a declaration of policy submitted by the Supervisors a declaration of policy for repeal of an ordinance is a proposition

for repeal of the ordinance. That the proposition is not in ordinance form is of no importance, as the Charter provides that when the declaration is approved by the Supervisors, it shall be carried out by ordinance. A proposition so to repeal or amend an ordinance is called and is a form of legislative referendum. See Section 1719, Elections Code.

A proposition or declaration for repeal of an ordinance is in the nature of a referendum or referral of it to the electorate and is therefore clearly within the prohibition of the quoted paragraph of the Charter if the subject matter is among those listed there.

To conclude otherwise would cause most disastrous results in the orderly functioning of government. The referendum of the annual appropriation ordinance, for instance, would be prohibited by petition of the electorate but could be accomplished by submission by the Supervisors of an ordinance or declaration for repeal. By this subterfuge the Charter responsibility of the Supervisors to provide the finances for the functioning of the government could be evaded and the exercise of the powers of government entirely stopped.

The word "referendum" in the paragraph quoted includes both repeal by submission of ordinance and by declaration of policy.

2. The remaining question is whether the Purchase and Use Tax Ordinance is an ordinance levying a tax.

This question is fully settled by the case of ROTH DRUG, INC. v. JOHNSON, 13 Cal. App. 2nd 720, involving the State Retail Sales Tax Act.

The State Retail Sales Tax Act provides that it shall go into effect immediately. The Act could do this effectively only if it was an act providing for a tax levy for the usual current expenses of the State, in accordance with Article IV, Section 1 of the State Constitution. The court held that the Act went into effect immediately and that it did so because it was an act providing for a tax levy for the purpose set forth in the Constitution.

The language of the Constitution is "acts providing for tax levies." The language of the Charter is "the ordinances levying taxes." For our purpose the legal situations are identical.

I must conclude therefore that the case of ROTH DRUG, INC. v. JOHNSON is controlling here and that the Purchase and Use Tax Ordinance is for the same reason an ordinance levying taxes within the

meaning of Section 179 of the Charter, and is not subject to its referendum provisions. For the reasons already stated, it is therefore not subject to referral, by the Board of Supervisors or its members, to the electorate whether by submission to the electorate of a declaration of policy or by submission of an ordinance for the purpose of repeal.

Respectfully submitted,

CITY ATTORNEY

Board of Supervisors

cc - Mayor
Chief Administrative Officer

WP

The 72 hour shift involved occurred June 17-20, 1947, and Sec. 36.1(b) of the Charter was applicable at that time. Opinion #3991 sets June 30, 1947, as the date when the emergency wartime sections were automatically repealed.

August 14, 1947

SUBJECT:

COMPENSATION FOR DAYS OFF BEFORE OR AFTER ABSENCE FROM DUTY; FIRE DEPARTMENT; 72 HOUR SHIFT.

Gentlemen:

This will acknowledge receipt of your request for an opinion as follows:

"A member of the Fire Department working on a six (6) day shift with seventy-two (72) hours off at the end of the shift, did not work the sixth watch of the shift and at the end of the seventy-two (72) hour period off duty did not work the first watch of the new shift. In other words he was off duty one shift before his seventy-two (72) hours off period and one shift at the end of his seventy-two (72) hours off period.

"He was deprived of pay for five (5) watches on account of the Civil Service ruling which the Fire Department has been following, which reads as follows:

'An employee will not be paid for a Sunday or a holiday if he is absent without pay both the day preceding and the day following such Sunday or holiday. If he works either the day preceding or the day following a Sunday or holiday, he may be paid for such Sunday or holiday.'

"He has an application before the Board of Fire Commissioners requesting pay for the three (3) shifts which he would have been entitled to had he worked the day before or the day after his seventy-two (72) hours off period.

"The Civil Service look upon this off period as compensatory time and he must work the full shift in order to be entitled to seventy-two (72) hours off period, or the day following the seventy-two (72) hours off period.

"The Board of Fire Commissioners would like your opinion as to whether or not he is entitled to pay for the seventy-two (72) hour off period."

OPINION.

Under Section 36.1 (b) each member of the uniformed force shall be entitled to at least one day off in each seven and such additional days or time off as may be approved by the Fire Commission. The Fire Commission having approved the practice of seventy-two hours off following a six day work shift and having adopted the Rule of the Civil Service Commission referred to may, in this case, take the position that the seventy-two hours off duty is comparable to a Sunday or holiday.

The seventy-two hours off, like a Sunday or holiday, is compensatory time to which an employee is entitled because he has worked a required period provided by law, ordinance, rule or individual agreement.

Therefore, a man who voluntarily remains away from work on the sixth watch of a six day shift and on the first watch of the following shift may be deprived of compensation for the seventy-two hours off between the two shifts.

Respectfully submitted,

John J. [illegible]

City Attorney.

SAN FRANCISCO FIRE DEPARTMENT.

CWD

August 15, 1947

SUBJECT: VETERANS' PREFERENCE; SAN FRANCISCO CIVIL SERVICE; COMMISSIONED RESERVE OFFICER IN UNITED STATES PUBLIC HEALTH SERVICE AS "VETERAN" WITHIN INTENT OF SECTION 145 OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO.

Gentlemen:

I am in receipt of your request for an opinion which reads as follows:

"Mr. Robert C. Levy, an applicant for examinations in the engineering field, has presented a War Service Certificate issued by the United States Public Health Service - Federal Security Agency which indicates that he served as a commissioned officer in the Reserve Corps of the Public Health Service from May 14, 1945 to January 19, 1946. Mr. Levy, on the basis of this War Service Certificate requests veteran's preference credits in civil service examinations.

"President Truman on June 21, 1945 issued Executive Order No. 9575 which states in part: "I hereby declare the commissioned corps of the Public Health Service to be a military service and a branch of the land and naval forces of the United States during the period of the present war." The Executive Order further prescribes regulations to govern the Public Health Service.

"Section 145 of the charter of the City and County of San Francisco states: "The term 'veteran', as used in this section shall be taken to mean any person who has been mustered into or served in the army or enlisted in or served in the navy or marine corps of the United States in time of war and received an honorable discharge or certificate of honorable active service."

"We have a communication from the Bureau of Navy Personnel, Navy Department, which states in part: "Administration of the Public Health Service was not affected by the Executive Order. The service continued to operate as a part of the Federal Security Agency."

We have received a communication from the Adjutant General's Office, War Department which states in part as follows: "The United States Public Health Service was not an integrate part of the Army of the United States during the period of 8 December 1941 to 31 December 1946."

"Since the term "veteran" is specifically defined in our charter, and since service in the United States Public Health Service does not seem to meet charter requirements for veterans

preference, your opinion is requested as to whether the Civil Service Commission may grant veterans perference to applicants for examinations on the basis of war service with the United States Public Health Service, Federal Security Agency.

"For your assistance, attached is copy of Executive Order No. 9575, copy of the communication received from the Navy Department, copy of the communication received from the War Department, and a copy of War Service Certificate issued Robert C. Levy. We request the return of the War Service Certificate."

O P I N I O N

Section 145 of the Charter of the City and County of San Francisco was ratified by the electors at the general election of November 7, 1939, having been ordered submitted to them by the Board of Supervisors as Charter Amendment No. 2 on September 11, 1939. It was approved by the Legislature and became law February 8, 1940. So far as material, Section 145 reads:

"Veterans with thirty days or more actual service, and widows of such veterans, who become eligible for appointment by attaining the passing mark in any entrance examination, shall be allowed an additional credit of five per cent in making up the list of eligibles secured by such examination. The term "veteran" as used in this section shall be taken to mean any person who has been mustered into, or served in, the Army, or enlisted in, or served in the Navy or Marine corps, of the United States, in time of war and received an honorable discharge or certificate of honorable active service. In the case of promotive examination, when the passing mark has been attained, a credit of three per cent shall be allowed to veterans or to widows of such veterans when requested by such veterans or widows. When an eligible has secured a permanent appointment from a list of eligibles derived from an entrance examination in which he has been allowed additional credits of five per cent as herein provided, and has served the full probationary period therein as provided in this charter, such other additional credits of five per cent that have been allowed him on lists of eligibles derived from other entrance examinations shall be automatically cancelled, and his rank on such other list or lists revised to accord with his relative standing before such additional credits were added, and he shall not be allowed such additional credits in any other entrance examinations. If he has received a permanent appointment from a list of eligibles derived from a promotive

examination in which he has requested and been allowed the additional credits of three per cent as herein provided, and has served the full probationary period therein as provided in this charter, such additional credits of three per cent that have been allowed him on lists of eligibles derived from other promotive examinations shall be automatically cancelled, and his rank on such other list or lists revised to accord with his relative standing before such additional credits were added, and he shall not be allowed such additional credits in any other promotive examinations. The civil service commission may, for services or employment specified by the commission, allow general or individual preference, but not less than ten per cent, for entrance appointment of veterans who have suffered permanent disability in line of duty, provided that such disability would not prevent the proper performance of the duties required under such service, or employment, and provided that such disability is of record in the United States Veterans' Bureau." (underlining added)

The Public Health Service Act of 1944 (58 Stat. 682, et seq.; 42 U. S. C. A. secs. 201 et seq.) provides (42 U.S.C.A. 217):

"In time of war, or of emergency proclaimed by the President, he may utilize the Service to such extent and in such manner as shall in his judgment promote the public interest, and in time of war he may by Executive order declare the commissioned corps of the Service to be a military service. Upon such declaration, and during the period of such war or such part thereof as the President shall prescribe, the commissioned corps (1) shall constitute a branch of the land and naval forces of the United States, and (2) to the extent prescribed by regulations of the President, shall be subject to the Articles of War and to the Articles for the Government of the Navy: Provided, That during such period or part thereof the commissioned corps shall continue to operate as part of the Service except to the extent that the President may direct as Commander in Chief. July 1, 1944, c. 373, Title II, §216, 58 Stat. 690."

As noted in your letter, President Truman, acting under authority of this law, June 21, 1945, in Executive Order No. 9575, declared in part:

". . . I hereby declare the commissioned corps of the Public Health Service to be a <u>military service</u> and <u>a branch of the land and naval forces of the United States</u> during the period of the present war." (underlining added)

Executive Order 9575 became effective July 28, 1945.

The conventional branches of the armed forces are the Army, Navy (including Coast Guard in time of war) and Marine Corps. By his Executive Order 9575 the President created a fourth branch, namely, "the commissioned corps of the Public Health Service".

Section 145 applies only to veterans of the "Army", "Navy", and "Marine corps". It does not include veterans of "the commissioned corps of the Public Health Service".

My opinion therefore is that Mr. Levy is not entitled to veteran's preference in San Francisco civil service examinations.

It may be noted that the Federal Veterans' Preference Act of 1944 (58 Stat. 387; 5 U. S. C. A. secs. 851 - 869) is broader than our section 145, it applying to veterans of "any branch of the armed forces of the United States". (5 U. S. C. A. sec. 851; see also Chapter V-1 of the Federal Personnel Manual). Hence, the fact Mr. Levy would be entitled to veteran's preference in applying for a Federal Civil Service position is, of course, not controlling in his application for a position in the Civil Service of San Francisco.

Returned herewith is the photostat of Mr. Levy's War Service Certificate together with other pertinent papers which you forwarded.

Respectfully submitted,

JOHN J. O'TOOLE
City Attorney

To: Civil Service Commission

GEB

August 19, 1947.

SUBJECT: Street and Highway Name Signs,
Regulated by Vehicle Code.

Dear Sir:

We have your request for an opinion as to whether the following sections of the Vehicle Code, which were enacted by the State Legislature in 1947, would compel San Francisco to erect street and highway name signs in accordance with uniform standards and specifications prescribed by the Department of Public Works of the State of California:

"Section 1. Section 465.8 is added to the Vehicle Code, to read:

465.8. Street and Highway Signs. The Department of Public Works shall determine and prescribe the standards and specifications, regarding location, kind, size, color and height, for all street and highway name signs hereafter erected on streets or highways.

Sec. 2. Section 465.9 is added to said code, to read:

465.9. Signs to Conform to Uniform Standards. Any street or highway name sign hereafter erected on any street or highway shall conform to uniform standards and specifications for street and highway name signs prescribed by the Department of Public Works.

Sec. 3. This act shall become operative on January 1, 1948."

OPINION

Under the sections of the Vehicle Code quoted above San Francisco will be obliged to conform to such standards and specifications as the Department of Public Works of the State of California shall prescribe when erecting street and highway name signs after the effective date of the legislation, namely, January 1, 1948. The law is not retroactive. Therefore all such signs presently erected or erected prior to the effective date (January 1, 1948) will not be subject to any regulation which may be prescribed by the Department of Public Works of the State of California under said section.

The sections deal with street and highway name signs hereafter erected, that is, after the effective date of the legislation. Therefore the painting, cleaning, repair or replacement of such signs erected prior to the effective date would not be subject to regulation.

After January 1, 1948, newly erected street and highway name signs will be subject to the regulation of the Department of Public Works of the State of California.

The enactment of these sections into law raises a possible question as to their constitutionality. It is well established that the regulation of traffic upon the streets of a city is not one of those municipal affairs over which the local authorities are given a power superior to that of the Legislature.

The question arises as to whether the erection of street signs on all the streets and alleys in San Francisco would come within the scope of "regulating traffic". It might be conceded that the interests of the state in the regulation of traffic might extend to the erection of street name signs on streets of major importance and state highways within the county.

The courts might well hold that the erection of street name signs on streets of minor importance would come within the definition of "municipal affairs."

However, this is a matter to be determined by the California courts and to date no court decisions have been rendered on the subject.

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY

Chief Administrative Officer

CWD

August 21, 1947

SUBJECT: BURIAL OF INDIGENT DEAD

Dear Sir:

We are in receipt of your request for an opinion upon the following:

"The indigent dead of San Francisco are now buried through a contractual arrangement made as the result of competitive bids. It is becoming increasingly more and more difficult to maintain a satisfactory procedure in this arrangement as there is but one mortician interested in the work and his interest is very minor.

"Accordingly, we have been giving some thought to the city providing cemetery or burial ground and entering into an agreement with the San Francisco College of Mortuary Science to act as the mortician in the same capacity as does a private undertaker.

"I do not believe it would be any problem if the city deemed it advisable to maintain a cemetery, but I am in doubt as to whether it would be legal to enter into a contractual arrangement with the San Francisco College of Mortuary Science for the handling of the unclaimed dead. The only interest that the college would have in becoming a party to the arrangement would be to use the cadaverous material for educational purposes in teaching the students for funeral directors profession.

"At the termination of the procedures used for teaching purposes, any subjects not utilized for scientific purposes would be conveyed to the Cemetery maintained by the City and County of San Francisco for the indigent dead. The earth burial would complete the educational college course and every phase of the profession from a practical standpoint.

"May I have the benefit of your advise as to whether it would be legal for the city to enter into a contractual arrangement with the San Francisco College of Mortuary Science for the handling of the unclaimed dead as above outlined."

O P I N I O N

The burial of the dead and the relief of indigents are both matters of state wide interest.

In 8 Cal. Juris at page 921 it is stated:

"The transportation of the remains of a deceased person is not 'Commerce' within the meaning of the term as used in the constitution of the United States wherein it is provided that 'congress shall have power to regulate commerce with foreign nations'. On the other hand, the matter of burial and exhumation, with a view to sanitary objects, has always been regarded as a subject of local regulation. It affects the public health and its regulation is strictly within the police powers of the State."

In the case of City and County of San Francisco v. Collins, 216 Cal. 187, the Supreme Court said:

"The City and County of San Francisco has the duty as such city and county of supporting its poor by the usual method of taxation, and such duty is mandatory and is a matter of state-wide interest in which said city and county is governed by the general laws and acts as a county--an agent of the state, and no inconsistent provisions in the municipal charter can limit the performance of such county functions."

The Health and Safety Code of the State of California sets forth a complete system of regulation for the burial and disposition of dead bodies and the Welfare and Institutions Code a complete scheme for the relief of the needy.

Certain matters of regulation in connection with these subjects have been delegated to county boards of supervisors to enforce. Section 207 of the Welfare and Institutions Code provides as follows:

"The board may provide for the burial or cremation of the indigent dead."

The Board of Supervisors of the City and County of San Francisco in Section 210 of the Health Code have enacted as follows:

"The Department of Public Health is hereby authorized and directed to provide for the interment of bodies of persons who have died in indigent circumstances by contracting for the service or by employment of persons for such purpose, as in the judgment of such Department shall be most suitable."

By the foregoing chain of delegation of authority the power to provide for the burial of the indigent dead has been vested in the local authorities without any express restriction or prohibition as to the method to be adopted. In the contract you propose with the San Francisco College of Mortuary Science it is true that the sole interest of the City and County is to carry out the duty imposed upon it by law; however the sole consideration for the entry of the college into the contract would be the use of the bodies for educational purposes. That use would have to be legally authorized

and the question is as to whether the city and county has the power to grant or permit such use.

The law has provided many safeguards against the unauthorized use of dead bodies in recognition of the fact that the burial and disposition of the dead is a subject which greatly interests the feelings of mankind. As pointed out in the case of Finley v. Atlantic Transport Company, 115 N. E. 716, "Respect for the dead and the feelings of mankind for their deceased parents, relatives and friends has been recognized by the Legislature and the courts". An unauthorized or illegal use of a dead body may subject the violator to criminal prosecution and civil suit. Section 7208 of our Health and Safety Code provides as follows: "Every person who unlawfully disposes, uses, or sells the body of an unclaimed dead person, or who violates any provision of this chaper is guilty of a misdemeanor."

Section 7208 is a part of Chapter 4 of the Health and Safety Code which chapter sets forth a system of regulation by the State of the disposition of the unclaimed dead for scientific and educational purposes, including embalming education. Section 7205 of that chapter provides as follows:

> "The bodies of the unclaimed dead retained by the state department shall be used solely for the purpose of instruction and study in the promotion of medical, chiropractic, and embalming education and science within the State."

The power of the State to assign the bodies of the unclaimed dead for scientific and educational purposes is found in the inherent power of every soverign state to provide for and promote the public health of its citizens. Undoubtedly this function could be delegated to the counties but there has been no express delegation of such power and none can be implied. The provisions of Chapter 4 indicate an intention that the disposal of the unclaimed dead for the aforesaid purposes is to be handled on a state wide basis.

In the case of Wilkinson v. Lund, 102 Cal. App. 767, the court points out:

> "A county may by charter impose duties upon supervisors and other county officers in addition to those prescribed by general laws but not inconsistent or in conflict therewith."

In 7 Cal. Juris, page 512, it is stated:

> "Inasmuch as a county has power to make only such contracts as are expressly authorized or such as may be necessary to the exercise of its powers, it follows that any contract made in excess of this power is ultra vires and therefore void."

In the proposed contractual arrangement with the San Francisco College of Mortuary Science insofar as it would provide for the burial of the indigent dead there would be no objection; however the contract would go further and allow the assumption of a dominian over the dead bodies that the city and county has no power to assume or delegate under existing law.

You are therefore advised that it is the opinion of this office that the proposed contract would be ultra vires and void.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer

TJB

August 24, 1947.

SUBJECT: Necessity of Procuring Actuarial Report before Reballot on any Proposed Change in the Retirement System.

Gentlemen:

You have requested an opinion as follows:

REQUEST

"The Judiciary Committee has pending before it a proposed amendment to Section 171.1 of the Charter relative to retirement provisions for officers and members of the Fire Department. Said amendment is identical with one considered by the Board of Supervisors last year at which time an actuarial report thereon was submitted by the Retirement Board.

"The Committee respectfully asks to be informed as to whether or not an actuarial report in connection with said proposed amendment which was submitted to the Board last year may be used this year for the purpose of complying with the provisions of Section 158 of the Charter, the pertinent portion of which provides that the Board of Supervisors shall secure through the Retirement Board an actuarial report of the costs and effect of any proposed changes in the benefits under the Retirement System before voting to submit any proposed charter amendment providing for such change."

OPINION

The charter provision to which you refer requires that the Board secure an actuarial report as above stated before voting to submit any charter amendment providing for a change in the Retirement System.

Compliance with this provision is a necessary prerequisite to your vote. Unless your vote on submission is after rescission of an earlier vote or on reconsideration of the motion to submit you must secure an actuarial report before voting.

The motion in the instant case is to submit the proposed charter amendment at a different election from that proposed a year ago. It cannot therefore be considered after rescission of an earlier vote or motion for reconsideration.

It may be that the Retirement Board will reply to your request with a reference to its earlier report and an incorporation of the earlier report by such reference in its current report on the pending proposal. That type of report would be entirely sufficient. It may be, however, that changes in law, departmental facts, mortality rates, actuarial methods, or otherwise would make necessary an entirely new report. The charter requires that the Retirement Board have the opportunity to determine this itself.

It is therefore necessary in the instant case that you request a report of it on the pending proposal.

Respectfully submitted,

CITY ATTORNEY

Board Of Supervisors

cc - Mayor
Retirement Board

WP

August 29, 1947

SUBJECT: ATTACHMENT OR GARNISHMENT OF SALARY OF FEDERAL EMPLOYEE

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Would you kindly submit an opinion as to the procedure, if any, in levying on the earnings of a person who is a civilian employee of the Army or Navy, or other federal agency, whether in the United States or outside its continental limits.

"The fathers of several Court wards, under payment order for support and maintenance of their minor children, have taken jobs as federal civil service employees in Guam and other Pacific Islands as a means of evading their responsibilities and evading detection. Your suggestions as to any method of enforcing the Court payment orders will be greatly appreciated."

O P I N I O N

There is no federal statute exempting the wages or salary of an officer or employee of the United States from garnishment or attachment. However, the Supreme Court of the United States in the case of Buchanan v. Alexander (1846) 4 Howard (US) 20, 11 L. Ed. 857, established the principle that wages due to an employee of the United States were not subject to attachment or garnishment. That case involved an attempt to attach money in the hands of a navy purser which was due as wages to seamen employed by the United States. The court stated at page 20:

"The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

"The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the

money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen."

Other cases sustaining the above stated principle are:

Elweyn's Appeal (1871) 67 Pa. 67 (salary of a navy officer);

McCarthy v. United States Shipping Board Merchant Fleet Corp., (CCA, DC) 53 2d 923 (salary of employee of United States Board Merchant Fleet Corp.);

Dickens v. Bransford Realty Co. (Tenn.) 210 S.W. 640 (salary of employee of railroad corporation operated by United States under act of Congress);

Cahn v. Allen (N.J. Eq.) 11 A 2d 315 (salary of postoffice clerk).

The only exception to the rule stated above was declared in the case of Federal Housing Administrator v. Burr, 309 US 242, 84 L. Ed. 725 wherein the Supreme Court distinguished the case of Buchanan v. Alexander, supra, and held that the salary of an employee of a federal governmental corporation which had been specifically granted the right to "sue and be sued" without an prohibition against attachment or garnishment, was subject to being attached or garnished. The court stated at page 244:

"The problem here is unlike that in Buchanan v. Alexander, 4 How. (US) 20, 11 L. Ed 857, where creditors of seamen of the frigate Constitution were not allowed to attach their wages in the hands of a disbursing officer of the federal government. That ruling was derived from the principle that the United States cannot be sued without its consent. There no consent whatsoever to 'sue and be sued' had been given. Here the situation is different. Section 1 of Title I of the National Housing Act (Act of June 27, 1934, Chap. 847, 48 Stat. at L. 1246) authorized the President 'to create a Federal Housing Administration, all of the power of which shall be exercised by a Federal Housing Administrator.' That section was amended in 1935 (Act of August 23, 1935, chap. 614; 49 Stat. at L. 684, 722, 12 USCA sec. 1702) by adding thereto the provisions that 'The Administrator shall, in carrying out the provisions of his title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competetant jurisdiction, State or Federal."

The court also stated in a footnote that of 40 governmental corporations listed in the case of Keifer & Keifer v. Reconstruction Finance Corp. 306 US 390, 83 L. Ed. 789 where Congress included authority to "sue and be sued", express prohibition against attachment or garnishment

was provided in only two instances.

Your request states that you are concerned with levying on the earnings of civilian employees of the army and navy or other federal agencies. You are advised that as to civilian employees of the army and navy and other persons directly employed by the United States there is no method whereby you may attach or garnish their salaries. However, as to the employees of federal governmental corporations which are expressly created by Congress which corporations have been given the right to "sue and be sued" without an express prohibition against attachment or garnishment, money which is owing by any such corporation to its employees is subject to attachment or garnishment.

Respectfully submitted,

CITY ATTORNEY

To: Geo. W. Ososke
Chief Probation Officer

LSM

August 29, 1947

SUBJECT: ADMISSION OF MENTALLY ILL TO STATE HOSPITALS ON CERTIFICATION WITHOUT COURT COMMITMENT; RESPONSIBILITIES OF LOCAL HEALTH OFFICER.

Dear Sir:

We have your request for an interpretation as follows:

> "I am enclosing copy of Bill #523 relating to admissions to hospital of persons believed to be mentally ill.
>
> "I shall appreciate your interpretation of this bill as it may affect the responsibilities of this Department."

O P I N I O N

Senate Bill No. 523, which becomes Article 3.5, Chapter 1, Part 4, Division 6, of the Welfare and Institutions Code, authorizes an additional, but not an exclusive, procedure for the admission of persons believed to be mentally ill to State hospitals. Under this additional procedure, persons believed to be mentally ill may be admitted to the State hospital upon application and certification by the local health officer as contrasted to the court commitment procedure set forth in the Code in Article 3 of Chapter 1 of Part 1 of Division 6, which continues in full force and effect. The "local health officer" is defined in the new article to mean the county, city or district health officer charged with the preservation of the public health in the county, city or district. The term "county" includes a city and county.

If the court commitment procedure is invoked by filing the petition as provided for in Article 3 of the existing law, your responsibilities under that article remain the same and are unaffected by the new enactment. If a report is filed with you as provided for in Section 6610.3 of the new article, you are then to be guided by the provisions of the new article.

Section 6610.3 provides that any relative or friend of a person believed to be mentally ill and in need of supervision, care or treatment may report that fact to the local health officer, together with the name and place of residence of the person. The local health officer may then make, or cause to be made, such investigation as may be necessary to ascertain the facts. If he is satisfied that admission to a State hospital, under the provisions of the new article, will be for the best interest of the person, he may make the application to a State hospital.

Under the rules of construction set forth in the Welfare and Institutions Code in Sections 1 to 18 thereof, the term "may" is to be construed as permissive and the term "shall" as mandatory. The foregoing language of Section 6610.3 being permissive, the local health officer is invested with a discretion as to whether he will take any action on the report and as to whether he will file an application following investigation, if one is made. From the standpoint of the

person believed to be mentally ill, the entire procedure is likewise permissive and voluntary to the extent that he, or some relative or friend in his behalf, can protest the proceedings at any time before his actual admission to the State institution and they must be dropped. (Sec. 6610.3).

If the local health officer acts on a report filed with him under the new article and decides to make application to a State institution, the application must be accompanied by certificates by each of two physicians, which certificates must conform to the requirements of Section 6610.4. It is to be noted that this section requires, among other things, that in any county or city and county having a board, panel, or commission of medical examiners under Section 5000 of the Welfare and Institutions Code, the certificates shall be furnished by physicians who are members of such board, panel, or commission of medical examiners. The City and County of San Francisco has such a Board of Medical Examiners appointed under Section 5000 of the Welfare and Institutions Code so, in this city and county, the certificates would have to be executed by two members of our Board of Medical Examiners.

If an application is made under the article and accepted by the Superintendent of the State hospital, it is the responsibility of the local health officer to deliver the person to the hospital within 5 days of the acceptance. (Sec. 6610.8). At any time after the admission of the person, he, or any relative or friend in his behalf, may request a court hearing to determine whether he is mentally ill, and the request must be granted. The local health officer is notified of the request but no action on his part is indicated. (Secs. 6611.1 to 6611.6).

Your attention is particularly directed to Section 6611.9, which provides as follows:

> "This article does not authorize any examination, as provided in Section 6610.4, or the admission to a State hospital of any person who is being treated by prayer in the practice of the religion of any well-recognized church, sect, denomination or organization, if he, or any relative or friend acting in his behalf, protests against such examination or admission to the local health officer investigating the case."

The foregoing is merely a general interpretation and discussion of the new enactment. If there are any particular provisions of the law upon which you are in doubt, please advise and I shall be pleased to render my opinion on the problem presented.

Respectfully submitted,

CITY ATTORNEY

To:
Dept. of Public Health
thru Chief Administrative
Officer.

TJB

September 3, 1947.

SUBJECT: CHARTER AMENDMENT, REQUIRING AT LEAST TWO OR MORE PERSONS TO COMPETE IN A COMPETITIVE EXAMINATION, LEGAL EFFECT OF.

Dear Sirs:

I am in receipt of your request for an opinion as follows:

"The Judiciary Committee of the Board of Supervisors has before it for consideration a proposed amendment to Section 145 of the Charter to provide that civil service tests shall be competitive between two or more persons.

"The Committee will again meet to consider this proposal Wednesday, September 3rd, 1947, and respectfully requests that you inform it on or before that date as to whether or not such an amendment is necessary from a legal standpoint."

OPINION.

Reference is made to my opinion, dated August 7, 1947, a copy of which is enclosed herewith. In view of this opinion, which clearly defines the rule as to what constitutes a competitive examination, I would advise you that the proposed amendment would be necessary in order to require that competitive examinations be between two or more persons.

In dealing with the matters which the charter has placed in the hands of administrative boards such as the Civil Service Commission, a careful analysis of their overall effect on the operation of these boards should be made. Sections 140 to 154, inclusive, of the charter set forth the duties of the Civil Service Commission. Section 140 concisely sums up the general responsibility of the Civil Service Commission, reading in part as follows:

> "Section 140. There is hereby established a civil service commission which is charged with the duty of providing qualified persons for appointment to the service of the city and county. All appointments in the public service shall be made for the good of the public service and solely upon merit and fitness, as established by appropriate tests, without regard to partisan, political, social or other considerations."

It is clear that so long as the tests are appropriate, which requirement includes the provisions of Section 145 that they be competitive, the commission has the discretion under its rule making power (see section 141) to establish the tests.

A study of the past history of the Civil Service Commission in relation to examinations shows that it has always required two or more persons to compete and has refused to conduct any examination where only one applicant appeared. The Civil Service Commission at the present time is encountering some unusual problems requiring the filling of certain positions with permanent help before a given date. In some cases, only one applicant applied to take the examination. In others, only one applicant qualified. In still a third group, only one applicant appeared to take the examination where several had applied. In the above cases, the tests met all the requirements of a competitive examination and, in my opinion, met the requirements of Section 145 as I have indicated in the enclosed opinion.

Since Section 140 charges the Civil Service Commission with the duty of providing qualified persons for appointment to the service of the City and County, no legislation should be passed that would hinder or prevent the efficient operation of this Civil Service Commission. If the scope is so drawn as to permit all persons qualified to compete, but only one person applies to take the examination, the Civil Service Commission will be in a much better position to perform the duties with which it is charged than where it is necessary for the Civil Service Commission to fill the position with temporary unqualified help. The definition of a competitive examination proposed in the charter amendment might well lead to the above unsatisfactory result.

As I stated in the beginning of this opinion, from the legal standpoint, such an amendment would be necessary to compel the Civil Service Commission to have at least two persons compete in examinations. However, such an amendment might greatly hamper the efficient working of the commission.

Respectfully submitted,

JNO. J. O'TOOLE
City Attorney.

To:
Board of Supervisors
c.c. Mayor
c.c. Civil Service Commission.

September 15, 1947

SUBJECT: DUTIES OF BOARD OF SUPERVISORS IN RE SPECIAL ELECTION TO FILL VACANCY IN 21ST ASSEMBLY DISTRICT.

Gentlemen:

You have requested an opinion as follows:

"The Board of Supervisors has received from the Governor, a proclamation pursuant to Section 1001 of the Elections Code, calling a special election to fill the vacancy in the 21st Assembly District, City and County of San Francisco.

"Section 1003 of the Elections Code provides as follows:

> 'Section 1003. Same: Publication: Special Legislative Elections. Upon receipt of the proclamation, the board of supervisors shall cause a copy to be published in some newspaper printed in the county, if any, at least ten days before the election. In case of special elections to fill a vacancy in the office of State Senator or member of the Assembly, upon receipt of the proclamation, the board of supervisors shall cause a copy to be published, as hereinbefore provided, except that publication need not be made for a longer period than five days before the election.'

"This office has been informed that, in the past, the Registrar has caused to be printed such proclamations as are referred to in this Chapter.

"It will be appreciated if, as soon as possible, you will respond to the following queries:

"1. What form of action should the Board take to comply with the provisions of Section 1003?

"2. Whom should the Board direct to cause a copy of the proclamation to be published?

"3. How many times and upon what dates should the proclamation be published?

"4. What other actions, if any, must be taken by the Board of Supervisors or the Clerk, in this connection by way of:

(a) Consolidation of the elections

(b) Submission again of such charter amendments as have already been ordered submitted

(c) Further legislation in connection with bond issues, preliminary steps for which have been initiated.

"Information relative to such other requirements, if any, necessitating action by the Board or the Clerk, will be appreciated."

O P I N I O N

1.2. The Board of Supervisors has already adopted Proposal No. 7105 as follows:

"WHEREAS, The Governor of the State of California has issued a proclamation under date of August 20, 1947, calling for a special election to be held on the 4th day of November, 1947, within the Twenty-first Assembly District of the State, located within the City and County of San Francisco, to fill the vacancy in the office of State Assemblyman from said District resulting from the resignation of Assemblyman Albert C. Wollenberg; now, therefore, be it

"RESOLVED, That pursuant to the provisions of the Elections Code of the State of California, this Board of Supervisors does hereby direct the Registrar of Voters to cause to be published a copy of said proclamation, in accordance with the provisions of said Elections Code, and to take any other steps, required by law, in connection with the holding of said special election."

As the Registrar is invested by section 173 of the Charter with the conduct, management and control of all matters pertaining to elections in the City and County this resolution was entirely proper as a means to accomplish the duties of the Board in the premises.

3. The proclamation should be published as soon after its receipt as may be for a period of at least five successive days, other than holidays, prior to the date of the election. Publication five times is sufficient. Section 1003 of the Elections Code prescribes the requisites in this regard.

4. (a) A resolution of the Board of Supervisors should be adopted in the form attached hereto, in accordance with the provisions of Division 11, Part 2, Chapter 4 of the State Elections Code, relating to the consolidation of elections.

(b) No action is required respecting submission of Charter amendments.

(c) No legislation is required on this account regarding bond issues.

Respectfully submitted,

City Attorney.

To: Board of Supervisors

wp

No. 4007 overruled by No. 77-46, dated Nov. 17, 1977

September 17, 1947

SUBJECT: LEGALITY OF RENT CEILING ORDINANCE ON (1) HOTEL ROOMS (2) APARTMENTS, FLATS AND OTHER DWELLINGS (3) COOPERATIVE APARTMENTS (4) ON EMPOWERING FEDERAL LOCAL RENT ADVISORY BOARDS TO ACT IN THE PREMISES.

Gentlemen:

You have requested an opinion in response to the following inquiries:

1. Can the Board of Supervisors lawfully pass an ordinance placing a rent ceiling on hotel rooms in San Francisco?

2. Can the Board of Supervisors lawfully enact an ordinance placing a rent ceiling on apartments, flats and other residences now covered by the present O. P. A. Federal Law?

3. Can the Board enact legislation to prevent evictions from cooperatively owned apartments, flats or rooming houses?

4. Can the Board empower Federal Local Rent Advisory Boards to determine which, if any, buildings may be allowed to operate as cooperatives?

OPINION

1. The Housing and Rent Act of 1947 enacted by the Congress of the United States is now in effect. Section 203 (a) of this Act repealed the rent controls maintained under the authority of the Emergency Price Control Act of 1942, as amended. Section 202 (c) of the Act excepts hotel rooms from its provisions as to housing accommodations. There is therefore no question involved here of possible conflict of a hotel rent ceiling ordinance with a federal act on the same subject.

The question then resolves itself into the fundamental one of the power of the City and County to invade the field of private contract in regard to hotel room rentals. Under the Emergency Price Control Act of 1942 the Congress did this under the war powers of the federal government - powers which are said to be among the broadest granted to it (U. S. v. MacIntosh, 283 U. S. 605) - and under its power to make all laws necessary and proper to carry into effect the powers granted. This Act was held constitutional as a war measure in Bowles v. Willingham, 321 U. S. 503.

The war powers of the federal government are exclusive.

The City and County cannot enact such an ordinance under this power. Nor has it the power to do so as an agent of the federal government for this purpose. The powers of the municipality are those reserved to it by the State Constitution, except as limited by its own charter, and it has no war power either in its own right or as an agent of the federal government.

The City and County of San Francisco has power to invade the field of private contract, if at all, only under the police power. "Under the police power rent laws have been sustained, but as temporary expedients only, to meet a great emergency due to the disastrous effects of a World War." McQuillin, Municipal Corporations, Vol. 3 revised page 83. Block v. Hirsh, 256 U. S. 134; Levy Leasing Co. v. Siegel, 258, U. S. 242.

The question of emergency will be discussed later. Temporarily, it will be assumed that one exists requiring the exercise of the police power of the City and County by the enactment of the subject legislation.

The police power of the City and County is based primarily on two provisions of the Constitution. The first of these in point of time is Article XI, Section 11, and is as follows:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

This grant to municipalities of police power "not in conflict with general laws" was part of the Constitution as adopted in 1879 and has remained in it unchanged ever since.

The second provision in point of time is Section 6 of the same Article XI of the Constitution, the section which contains the so-called home rule amendment for chartered cities respecting their municipal affairs.

Under Section 6, as originally enacted, in 1879 the legislature provided by general laws for the incorporation of municipalities. The charters of municipalities were subject to general laws and could be controlled by general laws.

In 1896 this section was amended to insert an exception in this last provision. The exception was as to municipal affairs. Section 6 then provided that such charters were subject to and controlled by general laws "except in municipal affairs." Under this section, it was then held that it was necessary to enumerate in a charter the specific powers which the city might exercise in relation to municipal affairs in order to remove the city in its control from the operation of general laws. Stege v. City of Richmond, 194 Cal. 305.

In 1914, Section 6 was again amended. This time a broad grant of power was given to chartered cities taking advan-

tage of the amendment or thereafter chartered under the Constitution "to make and enforce laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters." "In respect to other matters" it is still provided that "they shall be subject to and controlled by general laws."

One of the purposes accomplished by the amendment of Section 6 in 1914, as well as of Section 8 of Article XI, was therefore to obviate the necessity of specifically enumerating in the charter all powers relating to municipal affairs in order to remove the city as to such matters from the operation of general laws, Stege v. City of Richmond, supra.

Under the amendment of 1914 therefore, such a chartered city or city and county has entirely general power as to all its municipal affairs, without enumeration of those powers or affairs and subject only to its own charter restrictions. With this exception, its power as to municipal affairs is an unreserved one and as broad as that of the state in state affairs. Whyte v. City of Sacramento, 65 C. A. 534. Ripoly v. Benson, 20 Cal. 2nd 300. (Few constitutional provisions as to home rule of cities are as broad as this, a fact which frequently distinguishes the powers of California chartered cities from those of cities elsewhere.)

Section 1161, Code of Civil Procedure, and other sections of the State Codes provide for a right of action in unlawful detainer and other actions and rights of the landlord if the tenant fails to pay the agreed rent. The rent the nonpayment of which is the subject of the section is not the rent established by legal ceiling, but that established by contract. Other sections provide rights contrary to a legal rent ceiling as between hotelkeeper and guest. These are general laws of the State of California.

If hotel room rent control in San Francisco is not a municipal affair, the exercise of police power to control such rents contrary to general laws of the State may very well be questioned as contrary to general laws of the State and void. If, in this instance, it is a municipal affair, however, it becomes a matter for the exercise by San Francisco of its police power free from the control of general laws of the State.

The dividing line between municipal and state affairs is frequently not clear. For instance, health and sanitary matters, and improvements relating to them, are frequently matters of only local concern and are exclusively municipal affairs. Often however, they are broader in their effect and nature and become matters of concern of the inhabitants of the state at large in common with those of the city. Gadd v. McGuire 69 C.A. 347. They thus become state affairs subject to general laws. The same is true of the use of the streets for many purposes. Traffic uses are more frequently state affairs because of the continuity and interrelation of traffic uses. Secondary purposes of the streets are more fre-

quently municipal affairs subject only to local control. The State has thus far deemed the problem presented by the shortage of housing in San Francisco not to be a matter of state concern.

I believe that, until the hotel room shortage in San Francisco and the problems arising from it are shown to be matters of State concern, the Board of Supervisors is entirely justified in treating this problem as local and exclusively within its legislative power as a matter of municipal concern and a municipal affair.

I therefore conclude that your action in passing an emergency ordinance placing a rent ceiling on hotel rooms in San Francisco is valid, provided of course an emergency actually exists requiring such action.

2. Your second question is as to the legality of an ordinance placing a rent ceiling on apartments, flats and other residences now covered by the Federal Housing and Rent Act of 1947.

On November 15, 1944, at a time when the Emergency Price Control Act of 1942 was in effect, I answered this question in the negative in an opinion given you under that date. I did so mainly on the ground that there was no emergency calling for such action since the Price Control Act was already in operation and, because of it, no action of the Board was required for the "immediate necessary preservation of public peace, property, health or safety." (Charter, Section 16). I took that position at that time also because in the midst of a war in a defense area such as San Francisco there could be no question that the problem of housing shortage was not a local or municipal affair and any local ordinance would be subject to both state and federal laws dealing with the subject.

Some localities passed enforcement ordinances incorporating by reference the price and rent ceilings of the O. P. A. and prescribing penalties for their violation. The O. P. A. encouraged this course even to the extent of promoting a model ordinance for adoption by cities. Some courts and some city attorneys held this course valid. Other courts and many city attorneys held it invalid. A leading case holding such an ordinance valid is People v. Bell (Mich.) 17 N.W. 2d 193. A leading case to the contrary is City of Cleveland v. Piskura (Ohio) 60 N. E. 2d 919.

No court has upheld an ordinance prescribing different rent or price ceilings from those fixed under the federal law. At least, extended research has revealed no such report at this date.

Your question is specifically whether a rent ceiling can be established by ordinance as to housing accommodations for which the present Federal Rent Act now provides a rent ceiling. The

provision of the Act in that regard is Section 204 (b).

This provision specifies a maximum rent which is fixed at the rent in effect on June 30, 1947. The section provides a means of changing this maximum rent by order or regulation of the Housing Expediter. It further provides for a 15 per cent increase of this maximum rent by act of the parties by written lease.

You could not enact the same provisions as those contained in the subsection of the federal law because you could not make the Housing Expediter the agent of the City and County nor adopt in advance any adjustments he might make. You could not enact less stringent provisions than those in the Federal Act, because that course would be in violation of the federal act, the provisions of which are the supreme law of the land.

You could enact local regulations not in conflict with the federal law, provided that the matter is a municipal affair and that there is a sufficient emergency to justify the exercise of the police power.

While the federal legislation refers to control, the legislation itself must be examined to determine if its purpose is to occupy the field. Its expressed purpose indicates a contrary intention and its provisions are limited and specific.

Cases and quotation on this general subject are very numerous. A few are as follows:

In re Iverson, 199 Cal. 582, upholding an ordinance imposing additional liquor regulations to those provided under the Wright Act. In re Simmons, 199 Cal. 591, same. In re Hoffman, 155 Cal. 114, ordinance held valid requiring more milk solids than state act. Mann v. Scott, 180 Cal. 550, vehicular regulations. Ripoly v. Benson, 20 Cal. 2d, 366. National Milk Producers Assn. v. San Francisco, 20 Cal. 2d 101.

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said -- and the principle has been often reaffirmed -- that 'in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two Acts could not be reconciled or consistently stand together.' Sinnot vs. Davenport 22 How. (U. S.) 227, 16 L. Ed. 243."

"In Savage v. Jones 225 U. S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182, the court said: 'When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished -- if its operation within its chosen fields else must be frustrated and its provisions be refused their natural effect -- the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." Missouri, etc., R. C. v. Harris, 234 U. S. 412, 419, 34 S. Ct. 790, 58 L. Ed. 1377, LRA1915A, 942.

In spite of the fact that the United States still retains limited controls under its war powers, I believe that the City and County may treat this subject as a municipal affair until the state sees fit to treat it as a state affair, and may enact legislation not in conflict with the federal legislation, providing always the emergency justifies such extraordinary exercise of the police power.

3. Your third request is as to the legality of an ordinance prohibiting actions to recover possession of cooperative or community apartment houses, flats or rooming houses for the personal use of the owner unless stock in the cooperative is owned by persons who are then tenants of at least 80% of the dwelling units in the structure or premises and are entitled by reason of stock ownership to proprietary leases of dwelling units in the structure or premises.

Your question embodies in substance a regulation of the O.P.A. made in administration of the provisions of the federal rent law which expired on June 30, 1947. These provisions had to do with the right of an owner to gain possession of his dwelling for his own personal use.

The proposed ordinance is not in conflict with the federal act, but merely provides a more severe provision than that in the federal act. Its validity, as stated to you at your committee hearing, depends entirely upon the question of emergency. Although

the ordinance would not be void because it does not treat every requirement of the assumed emergency, it would be void if the emergency is far broader than the legislation and only these owners were chosen for discriminatory treatment.

4. You ask, fourth, whether local rent advisory boards appointed under the federal act may be empowered by ordinance to determine which, if any, buildings may be allowed to operate as cooperatives. This cannot be done. The boards are federal agencies having powers only as set forth in the federal law. These powers are not sufficiently broad for this purpose. The individuals are not disqualified for appointment for any legal purpose because of membership on the board and could be appointed on a board created by ordinance. This answer also assumes the fact of an emergency requiring such action.

5. Each of the foregoing answers has been based on the assumption of a finding of emergency requiring the extraordinary action discussed.

On November 15, 1944, I answered your request as to the validity of rent control legislation in the negative on the ground that no emergency existed because of the effective administration of federal legislation in this field in San Francisco. The situation existing in San Francisco at that time was not such as to require the exercise of the police power by you in legislation for the "immediate necessary preservation of public peace, property, health or safety." (Charter, Section 18).

On July 1, 1947, when federal rent control legislation ended as to hotels, you were confronted with the question as to whether legislation protecting permanent hotel occupancies was necessary for the "immediate necessary preservation of public peace, property, health or safety." In a hotel city such as San Francisco in which a large percentage of its inhabitants live permanently in hotels, it seemed to me at the time, and I am still of the opinion, that the legislation enacted by you in this regard would be sustained by the courts.

As to the types of housing accommodations which were the subject of the United States Housing and Rent Act of 1947 on its effective date on July 1, 1947 extensive provisions containing rent ceilings and prohibitions of eviction were set forth in the law. No one could therefore say on July 1, 1947 than an emergency existed in San Francisco, as to such housing accommodation, requiring action by you for the "immediate necessary preservation of public peace, property, health or safety."

If during the time in which the federal act has been in effect, emergencies have arisen in respects not covered by the federal act or which require more severe action than the federal

act, but not in conflict with it, and if any such emergency is sufficiently broad and severe as to require legislation by you for the "immediate necessary preservation of public peace, property, health or safety" in San Francisco, you have the power to enact the legislation required to cope with the situation.

You must find the emergency as a matter of fact and must have facts before you upon which to base your action. These facts must indicate reasonably to you that the legislation proposed is immediately necessary to preserve the public peace of San Francisco or its public health or its public safety. If you enter upon the finding of these facts I suggest that full minutes or other record be kept of your proceedings, so that, if you do find an emergency exists, a reasonable basis for your action will appear in your records.

If it then reasonably appears that legislation, not in conflict with the federal act and referred to in your inquiries 2 and 3 or either of them, is required for the peace, health or safety of the public of San Francisco, I advise you that such legislation would be valid. It would be valid until the end of the emergency or until the enactment of Federal or State legislation on the subject in conflict with it or occupying the entire field.

Respectfully submitted,

City Attorney.

WP

To: Board of Supervisors

September 18, 1947

SUBJECT: MUNICIPAL COURT ATTACHES: PAYMENT OF SUCH SALARIES BY CITY: CIVIL SERVICE APPOINTMENT OF SUCH ATTACHES.

Dear Sir:

You have made the following request for an opinion:

> "At the last session, the Legislature enacted Assembly Bill #1111, Statutes of 1947, Chapter #1113, determining the salaries of municipal court attaches, and also designating the number, classification and method of appointment of such court attaches. Will you kindly render your written opinion regarding the legality of the legislation insofar as it obligates the City and County to pay salaries in the amounts directed and to fill vacancies by appointment in the manner directed."

OPINION

The inquiry has three phases; first, relating to the power of the state to set the salaries of such attaches; second, can the legislature impose the obligation of payment thereof on the treasury of the city and county; finally, has the state legislative body the power to provide for appointments to fill positions in the manner indicated?

The basic authority of the legislature on this matter is contained in Article VI, Section 11, of the Constitution of California, which reads as follows in part:

> "The manner in which, the time at which, the term for which judges, clerks and other attaches of municipal courts shall be elected or appointed, the number and qualifications of said judges and of the clerks and other attaches, except as such matters are otherwise provided in this article, shall be prescribed by the Legislature."

The control of the state over the municipal courts and the attaches thereof is paramount (Chambers v. Terry, 40 Cal. App. (2d) 158). It is true that Article XI, Section 8½ describes a municipal court as being within the scope of municipal affairs which are to be provided for by Charter and therefore freed from state control. However, as pointed out in Schwartz v. Burnett Pharmacy, 112 Cal. App. 781, the presently constituted court is not the one described in the foregoing section of the Constitution.

In the case of Chambers v. Terry, 40 Cal. App. (2d) 153, it was held, (at page 158):

"It is still our view that the constitution of municipal courts from every viewpoint, except only that of the bare question whether they shall exist at all or not in given locations, is a state rather than a municipal affair. This seems to us necessarily to follow from the requirement of Section 11 of Article VI of the State Constitution that the legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts and for the jurisdiction thereof except in particulars otherwise specified in this section. . . . . The only particulars otherwise specified in Section 11, that is particulars in which the subjects mentioned are exempted from the requirement that they be governed by general law have to do with the right of the voters of the municipality to decide whether they wish such courts or do not wish them. They can if they choose, have courts of the sort prescribed by general law under authority of Article VI of the Constitution. But they must choose whether they want those courts or do not want them. They must either take them as the general law constitutes them or not take them at all. The circumstances that such courts are not in their functions or jurisdiction treated as falling within the category of municipal affairs is patent."

The question of the power of the supervisors of Los Angeles County operating under a freehold charter to set the salaries of attaches of municipal courts at a different rate than prescribed by the legislature was raised in Simpson v. Payne, 79 Cal. App. 780, 789,

"It appears, therefore, from the fact that municipal courts as provided for in the amendments of 1924 were not in mind at the time section 7½ of Article XI was adopted, that the jurisdiction of the municipal courts as adopted is much more extensive in character than the inferior courts therein provided for, and from the further fact that the municipal courts were designed for the purpose of exercising a large share of the judicial power of the state as courts of record with judges devoting their entire time and attention to judicial functions, that we cannot say that any authority over their functions or management either with relation to its attaches or otherwise was delegated to counties operating under a freeholders' charter. We think the very fact that the voters of the cities were required to assent to their establishment is indicative of the

true purpose and intent of the constitution, to wit, to 'provide by general law for the constitution, regulation, government and procedure of municipal courts' unhampered by any other legislative action."

It was therefore concluded that the board of supervisors did not have the power to establish a lower salary than that authorized by statute. Therefore, it is my conclusion that the legislature has the exclusive power to set or prescribe the means of setting the salaries of the attaches of the municipal court.

> Can the legislature impose the duty of payment of such salaries upon the treasury of the city and county?

There are numerous instances where this is done as, for example, the compensation of the judges of the superior court and the municipal court. The propriety of imposing the obligation of paying the salaries of their judicial officers upon the city and county seems clear. While there might be some question raised if the legislature attempted to impose such obligation on a municipality alone (vid Conlin v. Board of Supervisors, 114 Cal. 404; Fleming v. Hance, 153 Cal. 162), it is necessary to remember that:

> "The consolidated city and county of San Francisco partakes of the nature of a city and a county. It has the powers and performs the functions of both. The section of the constitution declaring that municipal charters prevail over general laws in municipal affairs relates solely to cities and towns. It has no application to San Francisco, except in so far as that subdivision of the state possesses and exercises municipal functions and constitutes a city, as distinguished from a county. With respect to the powers and functions of a county, exercised by San Francisco, as in any other county of the state, that section has no concern. The power of the legislature to enact general laws for the government of counties, as such, including San Francisco, remains unaffected, and unimpaired by that section. It does not make the charter of San Francisco paramount to such laws as to county affairs."
>
> Nicholl v. Koster, 157 Cal. 416, 420

Thus, the legislature no doubt has the power to treat the treasury of this municipality as a county treasury for these purposes.

Independent of the foregoing line of reasoning, the people of this municipality accepted the Municipal Court Act (Stats.

& Admts. to the codes 1925, p. 648, as amended) which imposed the obligation to support such a court if created. As pointed out in the quotation from Chambers v. Terry (supra), the only discretion invested in the electorate was whether to adopt the court or not. If adopted, then it is necessary that the Court be received as constituted by general law. The financing of this court at the time of adoption was made a charge on the city or city and county taking such action. Having accepted this condition, the municipality can not now avoid the obligation of paying the compensation. (Reyes v. San Francisco, 177 Cal. 313).

In reply to the third aspect of your inquiry, it is my opinion that the state legislature has the power to designate and require the civil service commission of the city and county to act in filling vacancies amongst the attaches of the municipal court. That the legislature may delegate this power and need not itself exercise it, is borne out in numerous cases in this state. In referring to the propriety of such delegation it is stated in People v. Provines, 34 Cal. 520:

> "The Legislature has authority under the Constitution to create many offices, and to provide the mode of filling them. (Constitution, Art. XI, Sec. 6.) Some are filled by the Legislature itself; some are authorized by the Act creating the office, to be filled by the Governor; some by an election by the people, and some by an appointment by other officers. The Legislature, if so disposed, might provide that offices created by itself should be filled by appointment made by certain citizens named, having no official relation to either department of the Government. The matter is left entirely to the discretion of the Legislature."

Since the organization, jurisdiction and function of the court is strictly a state affair, it follows that by enactment of the legislature, the civil service commission of this city and county may be required to act in the manner prescribed so as to fill such vacancies in the municipal court.

I refer you to my previous opinions of January 6, 1946, March 22, 1945, and March 24, 1943, and August 17, 1951.

Respectfully submitted,

City Attorney

To: Clerk of the Municipal Court

September 18, 1947

SUBJECT: DISABILITY TRANSFERS--AUTHORITY OF COMMISSION TO FIX SALARIES.

Gentlemen:

We have your request for an opinion as follows:

"I am attaching hereto letter received from Mr. B. J. Cummings relative to his belief that he is being paid a lower rate per hour than his position of Watchman calls for.

"After you have investigated the matter, I would appreciate receiving your opinion concerning same."

Mr. Cummings' letter reads as follows:

"I was hurt in line of duty while employed with Municipal Railroad injuring my back.

"My doctor advised me try and get transfered from the Position of Motorman.

"I transfered from Motorman Municipal Railroad to Watchman Park Dept. June 16, 1947 received Pay $190 for five day week rate June 16 to June 30th.

"On July 1 to July 15th pay was paid at rate of $210 five day week, but on July 31st check they took away and put me back to the rate $190. Claimed could not be brought up to the $210 rate whitch is now being paid three other Watchmen that had transfered from Municipal Railroad. Medical transfers the same as myself.

"I maintain by the Charter Amendment voted by the People, I should be brought up to the maximum of the Watchman Position whitch is $215 for five day week, or at least $210 rate whitch is paid the three other Watchman.

"I would like to have you ask the City Attorney for a ruling on this case.

"As Mr. Henderson of the Civil Service andthe Commission ruled against eight cases about the same nature."

O P I N I O N

On June 12, 1947, Mr. Cummings received a disability transfer from motorman municipal railroad to watchman park department. His rate of pay as motorman at the time of transfer was $1.24 an hour which would result in a monthly rate of pay of $210 per month upon conversion from the per diem rate to the monthly rate. However, prior to July 1, 1947 the compensation schedule for watchman park department was $150-$190 per month. Mr. Cummings was therefore transferred at the then maximum of $190 per month. Effective July 1, 1947, the compensation schedule for watchman was increased to $175-$215 per month. Mr. Cummings pay was not adjusted by the Civil Service Commission on July 1, 1947 in view of Section 71 of the Charter which provides as follows:

> "All increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, and no such increase shall be effective prior to the fiscal year for which the budget was adopted."

The pay of the three other disability transferees referred to in Mr. Cummings' letter who are receiving $210 per month had been set up in the budget and the appropriation ordinances at that rate.

I understand that the Commission was partly influenced in its determination by an opinion I rendered on June 8, 1945to the effect that salaries budgeted at a salary rate could not legally be fixed at a different rate in the salary ordinance. I do not believe that the rule of law propounded in that opinion would preclude an adjustment in this particular case if the Commission saw fit to make such an adjustment. Such an adjustment would be more in line with the situations covered in my opinion of September 4, 1945 wherein it was pointed out that certain administrative adjustments could be made from compensation reserves where basic compensation schedules were not affected. In this case the adjustment would not be strictly an increase in the sense of the term as used in Section 71 but would be in effect the restoration of a reduction. If Mr. Cummings had been transferred subsequent to July 1, 1947 it is my understanding that in accordance with existing procedure he would have been transferred at the rate of pay resulting from the application of the conversion factor or $210 per month and this despite the fact that the position filled may have been budgeted at a lesser sum.

There are undoubtedly many equities in Mr. Cummings' favor but in the final analysis it was entirely within the discretion of the Commission as to whether an adjustment would be made in view of the authority

vested in it by Section 156 of the Charter covering disability transfers which reads in part as follows:

> "Positions filled under the provisions of this section shall not be subject to salary standardization but the salaries thereafter shall be fixed by the civil service commission within the limitation herein provided. The civil service commission shall make rules to carry out the intent of this section and such rules shall govern all transfers made under the provisions of this section."

The limitations referred to are limitations on the maximum rates of pay that can be fixed under the section and not on the intermediate rates.

The mere fact that inequalities may occur as a result of the exercise of the authority vested in the salary fixing body is not sufficient to warrant judicial interposition and the holding of such action illegal. As pointed out in the case of Banks v. Civil Service Commission, 10 Cal. 2d 435:

> "In said action, where plaintiffs, who had passed the beginner's stage, complained that there were some fifty-eight other jailers serving the city and county, all of whom were receiving the higher salary, and only the four plaintiffs were limited to the lesser salary, there appeared to be an inequality of which they could justly complain, but the power to fix the salaries for such positions having been lodged by the San Francisco Charter in the Board of Supervisors, plaintiff's remedy lay not with the courts but with the authority upon whom the charter imposed the duty of fixing such salaries."

In the case of City and County of San Francisco v. Boyd, 140 Pac. 2d 666, it was held that courts will not interfere with the discretion of the rate-making authority unless the determination of such authority is fraudulent or so palpably unreasonable as to indicate an abuse of discretion as a matter of law.

You are advised that it is my opinion that no such abuse is indicated in this case and that the commission acted within its legal authority in fixing Mr. Cummings' rate of pay at $190 per month pending the establishment of next year's budget.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
Attn: Mr. Gallagher
cc: Civil Service Commission
TJB

September 22, 1947

SUBJECT: NO SPECIFIC TIME LIMIT FOR PLANNING COMMISSION ON REZONING APPLICATION OF PROPERTY OWNER

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"On September 16, 1931, the City Planning Commission received the following opinion from your office concerning the length of time it may consider a rezoning application before it must make a decision:

'When the City Planning Commission does not act on an application for rezoning within ninety days after first publication of hearing, it is presumed to have approved the application, and an appeal to the Board of Supervisors is good and valid.'

"At the present time the City Planning Commission is considering three applications for rezoning, all of which are concerned with large parcels of property which are adjacent to the northeastern section of Lake Merced. It is possible that the Commission may not be able to reach a decision on the first application within ninety days of the date the notice of hearing was published. The reason for this is that the area is very large and requires a comprehensive study. Furthermore, the Commission could not be certain as to the plans of the other two property owners until they actually had filed applications for rezoning. Notice of the hearing of the third applicant to come in will be published more than six weeks after the publication date of the first applicant.

"The Commission desires to give this entire matter thorough and careful study before reaching a decision on any one of the three applications. Therefore, I am writing to ask your opinion on the following question:

"Is it possible to continue holding an application under advisement for a period of more than 90 days because of the need for additional time to study related applications filed subsequent to the first application? It is understood that the entire area in question is under constant study, i.e., the case is being actively considered. If the answer to the question is yes, what is the time limit?"

O P I N I O N

My previous opinion to you dated September 16, 1931, and to which you refer, was based upon a specific requirement of the old charter that the City Planning Commission act within 90 days from and after the first publication of notice of hearing on any rezoning application by a property owner or the application would be deemed approved. (See Section 4, Article XVIII of the old charter).

This specific requirement, in so far as it refers to an application by a property owner, has been eliminated from the new charter of 1932. (See section 117 of the present charter). Hence, we now do not have any specific time limitation within which the City Planning Commission must act upon a rezoning application by a property owner. This does not mean, however, that the City Planning Commission can delay a decision upon any such matter indefinitely. There is still the general requirement of law that compels the City Planning Commission to act on such a matter - and to act within a reasonable time under all the circumstances involved in each particular case.

You are thus advised in connection with your inquiry as presented.

Respectfully submitted,

City Attorney

To: City Planning Commission

MSW

September 22, 1947

SUBJECT: RIGHTS OF MEMBERS OF FIRE DEPARTMENT,
ON LISTS FOR SALVAGE CORPS PROMOTIONS.

Gentlemen:

I have your request for an opinion on the following:

"On June 17, 1947 promotional examinations were held for Class H20 Lieutenant, Fire Department, and Class H206 Lieutenant, Salvage Corps. Firemen in the First Department were eligible to take both of these promotional examinations, but Firemen, Salvage Corps were eligible to compete in the examination for Lieutenant, Salvage Corps only, in accordance with opinions of the City Attorney of April 2, 1947 and April 9, 1947.

"It is expected that the eligible lists resulting from these promotional examinations will be adopted by the commission on on September 17. The names of a number of firemen in the Fire Department will appear on both promotive eligible lists.

"In accordance with regular procedure in the Civil Service Commission, the name of a fireman of the Fire Department who accepts appointment from the eligible list of H206 Lieutenant, Salvage Corps, would remain on the register of eligibles for Lieutenant, Fire Department and would be certified from the eligible list of H20 Lieutenant, Fire Department if later reached for appointment from such list. Also, in accordance with regular procedure, a fireman of the Fire Department who accepts appointment to Class 206 Lieutenant Salvage Corps would be permitted to relinquish such position and be reinstated to his previous civil service status of fireman in the Fire Department.

"Question has not been raised concerning the legality of such actions in view of the City Attorney's opinion of April 9, 1947 which states in part: 'Thus a person who is a member of the Fire Department and who has taken an examination for the position of lieutenant in the Salvage Corps is frozen in the Salvage Corps, once he takes the position with that Corps, and he becomes ineligible for further service in the Fire Department.'

"Your opinion is requested as to whether:

1. the name of a fireman of the Fire Department who accepts appointment from a promotive

eligible list of Class H206 Lieutenant, Salvage Corps may be retained on a promotive eligible list for Class H20 Lieutenant, Fire Department and such eligible be appointed from that list if later reached for certification.

2. may a fireman in the Fire Department who accepts appointment from the promotive eligible list of H206 Lieutenant, Salvage Corps, relinquish such appointment and be reinstated in a civil service status of fireman in the Fire Department.

"Your early response to these questions will be appreciated, inasmuch as the rights of the eligibles on the promotive list of Class H206 Lieutenant, Salvage Corps will determine whether or not these men will accept appointment from such list."

O P I N I O N

In my opinions of April 2 and April 9, 1947, I discussed the question concerning the right of members of the Salvage Corps and Fire Department interchanging positions, that is, their right to transfer from the Salvage Corps to the Fire Department, and vice versa. These opinions were confined solely to an interpretation of Section 38.1 of the Charter, wherein the following specific language occurs:

> "The personnel of said salvage corps shall not be transferred to any other branch or division of the fire department but shall at all times be subject to the orders of the chief engineer of the department in so far as actual service is concerned. The personnel of said salvage corps may be increased in accordance with the fiscal and budgetary procedure provided for in the charter, but members of any other branch or division of said fire department shall not be transferred to said salvage corps except after examination and certification as to eligibility by the civil service commission."

In your present request, the problems presented are of a different nature. They are concerned with the administration of your department and the effect of certain of your rules in regard to eligibles on promotive lists.

I

In answer to your first question, I advise you that the name of a fireman of the Fire Department who accepts appointment from a promotive eligible list, Class H206, Lieutenant, Salvage Corps, may also be retained on a promotive eligible list for

Class H20, Lieutenant, Fire Department, and the eligible may subsequently be appointed from that list when his name is reached for certification.

The eligible or group of eligibles to whom you refer in your request have an entirely different status than a member of the Salvage Corps who seeks to be transferred into the Fire Department. These individuals to whom you refer in your request were at the time that they took the promotive examination eligible to take both the examination for the Fire Department and Salvage Corps and were members of the Fire Department. These cases do not come under Section 38.1 of the charter but must be treated in accordance with the general rules of the Civil Service Commission.

This fact is important, however, that if a member of the Fire Department accepts an appointment in the Salvage Corps, and at the time he makes such acceptance is not on any list from which he may subsequently be appointed to the Fire Department, or if his name is on a list and the list expires or he waives appointment, then he is frozen in the Salvage Corps permanently and cannot transfer back to the Fire Department by way of a promotive examination.

II

Answering your second question, I advise you that a fireman who accepts appointment from the promotive eligible list of H206, Lieutenant, Salvage Corps, may relinquish such appointment and be reinstated in a civil service status of fireman in the Fire Department. The person or persons referred to in this portion of your request have the same rights as any other civil service employee in the civil service, and any attempt to take away such rights would be illegal. If the fireman were not eligible to be reinstated in his former civil service status as a fireman, he would have no position in the civil service and he would lose the security which civil service intends that he shall possess.

Therefore, I advise you that both of your questions must be answered in the affirmative, bearing in mind the prohibitions that may arise if a member of the Fire Department becomes a permanent member of the Salvage Corps, and does not come within either of the exceptions noted above.

Respectfully submitted,

City Attorney

To: Civil Service Commission

BJW

September 24, 1947

SUBJECT: MILK INSPECTION SERVICE FEES

Gentlemen:

I am in receipt of your request for an opinion as follows:

"I am referring to you for an opinion as to its meaning, Section 503 of Senate Bill 344, known as the Agricultural Code Revision Bill, adopted by the 1947 Legislature.

"This section, relating to licenses payable to Approved Milk Inspection Services, was adopted presumably to prevent double inspection fees on milk. It was to cover situations where an Approved Milk Inspection Service, such as San Francisco, maintains inspection at a county receiving and cooling plant to supervise the inspection of dairy farms tributary to the plant and the shipment of market milk into San Francisco, and where a part of the milk may be diverted from the country plant into the jurisdiction of some other Approved Milk Inspection Service; Oakland for instance, and the City of Oakland also levies a license fee on the dairy farms, or an inspection fee on that part of the milk diverted to that city.

"Section 503 of the Agricultural Code reads as follows:

"'503. A city or county or group of either or both may, for the purpose of maintaining an approved milk inspection service, levy and collect a license fee from distributors of market milk within the jurisdiction of said approved milk inspection service; provided, that no distributor shall be required to pay a license fee except to the city or county maintaining an approved milk inspection service under whose supervision the distributor's plant or plants operate, or to any approved milk inspection service designated by the director which inspects dairy farms, the milk of which is shipped direct to a distributor who operates a plant within the jurisdiction of another approved milk inspection service; and provided, that in no case shall the total of said license fees be more than sufficient to maintain the cost of such approved milk inspection service for which said license fees are levied.'

"Section 503 replaces Section 500 (c) of the 1945 Code, which reads as follows:

"'Section 500 (c) (1945). A city or county or group of either or both may, for the purpose of maintaining an approved milk inspection service levy and collect an inspection or license fee from those who come under the provisions of this division; provided, that no producer and no distributor shall be required to pay an inspection or license fee to more than one city or county on the same market milk; and provided, that in no case

shall the total of said inspection or license fees be more than sufficient to maintain the cost of the approved milk inspection service for which such inspection or license fees are levied.'

"A digest prepared by a trade association summarizes Section 503 as follows:

"'Deletes reference to inspection fees, provides for collection from distributors only. Distributor to pay inspection service under supervision of which his plant operates and the service which inspects dairy farms all of the milk from which goes direct to distributor operating plant in jurisdiction of another inspection service.'

"Provisions of Sections 486, paragraphs 2 and 3, and 504, of the San Francisco Municipal Code covering inspection fees for milk, appear to be closely related to the subject of Section 503 (1947) of the State Agricultural Code.

"'Section 486, paragraphs 2 and 3 of the (Municipal Code). No permit to ship or transport raw milk or raw cream into the City and County of San Francisco from any central skimming or cooling station outside the City and County shall be granted unless said milk or cream so cooled and shipped or transported comes from dairy farms or plants scoring at least seventy-five (75%) per cent, and otherwise complying with the provisions of this Article, and unless said skimming or cooling station is constructed and maintained in accordance with plans and specifications approved by the Director of Public Health and said milk or cream is handled as required by this Article, and unless the person owning or operating said skimming or cooling station shall pay the salary and maintenance of a special inspector appointed by the Director of Public Health, who shall supervise the production of market milk on dairy farms supplying said skimming and cooling station or plant, and whose duty it shall be also to inspect and sample all milk received at said skimming and cooling station or plant. Said inspector shall also perform such other duties not inconsistent with the provisions of this section, as shall be assigned to him by the Director of Public Health.'

"'Funds sufficient to defray the salary and maintenance of said inspector shall be deposited monthly with an authorized representative of the City and County of San Francisco.'

"'Sec. 504. Fees for Inspection of Milk. For issuing a permit and making the inspection required, the Director of Public Health shall collect monthly the sum of Twelve (12¢) Cents for each one hundred (100) gallons of milk that the holder of such permit shall sell or supply for human consumption, within the city and county during the months previous. The holder of such permit shall ren-

der a true statement of the amount of milk so sold or supplied and pay the fee hereby imposed on or before the twentieth (20th) day of each calendar month. A failure to pay such fee or render the statement shall operate to revoke the permit theretofore issued.'

"Section 503 (1947) becomes effective September 19, and as we are led to believe that its terms may cause our inspection fees to be diminished, an early opinion would be appreciated in order that necessary adjustments can be made."

O P I N I O N

The control and inspection of milk and milk products is not a municipal affair but rather is a matter of statewide interest therefore if there is a conflict between state and local laws the state law will prevail.

Natural Milk Producers Assn. v. City and County of San Francisco, 20 Cal. (2d) 101

In re Hoffman, 155 Cal. 114

Opinions of City Attorney of San Francisco No. 3608a - 1944 Series

The purpose of Section 503, Agricultural Code adopted by the legislature in 1947 which replaces Section 500c of the same code is clearly intended to place the burden of paying inspection fees upon distributors only. Distributors are the only persons named in said section whereas under section 500 an approved milk inspection service could collect an inspection or license fee from "those who come under the provisions of this division." This included farmers or producers as well as distributors.

Further proof that the intent of the legislature in enacting 503 of the Agricultural Code was to make the distributor and not the producer liable for the payment of license and inspection fees may be found in the Senate Journal of Wednesday the 16th day of April, 1947. This journal contains a digest of proposed laws prepared by the Legislative Counsel at page 1411 the following may be found:

> "503 (500, subd. (c)) Milk inspection service fees. Deletes reference to inspection fees, provides for collection from distributors only. Distributor to pay inspection service under supervision of which his plant operates and the service which inspects dairy farms all of the milk from which goes direct to distributor operating plant in jurisdiction of another inspection service."

You are advised therefore that beginning September 19, 1947 you can no longer collect license or inspection fees for the maintenance of the approved milk inspection service from the producer.

Respectfully submitted,

CITY ATTORNEY

To: Department of Public Health
via Chief Administrative Officer
CHA

September 24, 1947

SUBJECT: VACATION OF CITY STREETS, PROCEDURE FOR;
STREETS AND HIGHWAYS CODE.

Gentlemen:

I have your request for an opinion as follows:

"Would you kindly give me an opinion on the number of times the Department of Public Works is required by law to publish a notice in the official newspaper of a Resolution of Intention to close and abandon a public street.

"It has been the policy for many years in the official resolution for closing and abandoning of a street to include the wording:

"'WHEREAS, the Clerk of this Board did transmit to the Department of Public Works of the City and County of San Francisco a certified copy of said resolution and said Department of Public Works did upon receipt of said resolution, cause to be posted in the manner and as required by law, notice of the passage of said resolution and did also cause in the manner and as required by law a notice similar in substance to be published for a period of 10 days in the San Francisco Chronicle, the official newspaper of the City and County of San Francisco, and .....'

"The Resolution of Intention states:

"'The closing and abandonment of said _____ shall be done and be made in the manner and in accordance with the provisions of Section 107 of the Charter of the City and County of San Francisco and the General Laws of the State of California, and notice is hereby given that on the _____ day of _____ this Board will hear all persons interested in or objecting to said closing and abandonment.'

"The 1941 Street Improvement Act of California, Street Opening Act of 1889, Approved April 4, 1941, Statutes of 1941, Chapter 79, Division 5, Part I, Streets and Highways Code, Section 3223 provides:

"'The Street Superintendent shall also cause a notice similar in substance to be published for a period of 10 days in one or more daily newspapers published and circulated in the City and designated by the City Council, ...'

"Chapter 426 of the Streets and Highways Code, Section I, Section 8322 reads as follows:

"'Before the vacation of any street or part thereof is ordered,

the City Council shall pass an ordinance declaring its intention to do so, referring to a street or part thereof by its lawful or official name or the name by which it is commonly known ..... the Ordinance of Intention shall fix the time and place for hearing all persons interested in or objecting to the proposed vacation, which time shall be not less than 15 days from the day of passage of the Ordinance and shall be published or posted in the manner prescribed by law for the publishing or posting of Ordinances of the City....'

"Would you kindly inform me whether, if proceeding to close and abandon a street under Chapter 426, Section 8322 of the Streets and Highways Code, it is necessary for the Department of Works to publish notices of said closing and, if so, how many times the Department of Works is required to publish said notice."

O P I N I O N

I advise you that in proceeding to close and abandon a street under Section 8322 of the Streets and Highways Code of the State of California, it will not be necessary for the Department of Public Works to publish notice of such closing. The Department of Public Works must prepare and submit the proper ordinance of intention to the Board of Supervisors as provided in Section 8321 of the Streets and Highways Code. The clerk of the Board of Supervisors will then publish the proposed ordinance in accordance with Section 13 of the Charter.

It will be necessary for the Department to post the necessary notices along the line of the street or part thereof proposed to be vacated as provided in Section 8322 of the Streets and Highways Code.

Under Section 8305 of the Streets and Highways Code an ordinance is defined as including a resolution and the forms previously used should be amended in accordance with this opinion and used in subsequent cases.

In view of the foregoing please note that you are proceeding under the provisions of Sections 8300 to 8331 inclusive of the Streets and Highways Code, and all proceedings should be prepared accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Department of Public Works
via Chief Administrative Officer
BJW

September 24, 1947

SUBJECT: EXEMPTION FROM HEALTH SERVICE SYSTEM OF ADHERENTS OF RECOGNIZED RELIGIOUS SECTS.

Gentlemen:

Your request for an opinion reads as follows:

"Mr. Harry L. Downie, President of the Health Service Board, requested that a letter be addressed to you asking for an opinion on the extent of the Board's authority regarding the procedure for granting exemption from membership in the Health Service System on religious grounds.

"The following language is contained in Section 172.1, Subdivision 1 of the Charter:

"'Any employee who adheres to the faith or teachings of any recognized religious sect, denomination or organization and, in accordance with its creed, tenets or principles, depends for healing upon prayer in the practice of religion shall be exempted from the system upon filing annually with the health service board an affidavit stating such adherence and dependence and disclaiming any benefits under the system.'

"Your opinion is respectfully requested as to whether or not the Health Service Board would have the authority to require a letter from the church or practioner of the employee who requests exemption verifying the statement of religious faith referred to in connection with the affidavit described in the Charter language quoted."

O P I N I O N

Section 172.1, Subdivision 1 of the Charter which you quote in your request is clear and unequivocal in meaning. The grant of power and authority of the system springs from the Charter and rules and regulations cannot be promulgated which would be contrary thereto.

The quoted section requires only from the person applying for exemption an affidavit stating his or her adherence and dependence upon such religious faith or teachings. It might well be that such person does not attend a church or appear before a practitioner or reader but practices self-healing in accordance with the tenets of some religious sect or denomination. To require that person to submit a supporting affidavit or letter would be seeking the impossible and is such a situation as the framers ofthe Charter had in mind, hence their failure to state in the section that such an affidavit or letter also be furnished.

You are advised therefore that the system cannot require an affidavit or letter from anyone except the applicant for exemption.

Respectfully submitted,

CITY ATTORNEY

To: Health Service System
CHA

September 30, 1947

SUBJECT: AMENDMENT OF SECTION 1 OF FIRE DEPARTMENT SICK LEAVE RULES TO INCLUDE PERSONNEL OF FIRE BOATS AND SALVAGE CORPS

Gentlemen:

I have your request for an opinion, as follows:

"I have been directed by the Board of Fire Commissioners to ask your opinion on the request of the officers and members of the Salvage Corps and Marine Crew of the Fire Boats regarding Paragraph four (4) of Charter Amendment No. 7 which was adopted on November 5, 1946.

"Attached herewith you will find copy of our Sick Rule and letter from the above mentioned employees of the department.

"Will you kindly advise us if their request can be granted, and if so, should Section 1 of our Sick Rule be amended as follows:

"'The officers and members of the uniformed force of the Department, including Pilots, Marine Engineers and Marine Firemen of Fire Boats and officers and members of the Salvage Corps, shall be entitled to sick leaves and disability leaves with full pay subject to the provisions of this rule as hereinafter defined, and all other employees of Department shall be entitled to sick leaves and disabilities in accordance with the provisions of Rule 32 of the Rules of the Civil Service Commission.'

"Your attention to the above will be appreciated."

O P I N I O N

Your request indicates that since the adoption of section 188.3, the charter, you have been asked to modify and amend your sick rule to include therein the personnel of the fire boats and the salvage corps. A reading of this new section of the charter indicates clearly that it was the intention of the voters, that the groups mentioned therein should be given the same rights as other members of the Fire Department, and since, under your present sick rule they are not included, it is necessary that you amend it in conformance with this new provision of the charter.

I advise you therefore that section 1[illegible].3 provides that the members of the salvage corps and of the fire boats should be given the same disability privileges, whether caused by bodily injuries or disability, if incurred through performance of duty, as other members of the Fire Department. You are further advised that you should amend section 1 of your sick rule to read as you have indicated in your request for this opinion.

Respectfully submitted,

City Attorney

To:

The Office of Board of Fire Commissioners

BJW

October 14, 1947.

SUBJECT: Retirement System: Rights of Persons in Military Service.

Gentlemen:

I have your request for an opinion as follows:

REQUEST

"The Retirement Board at its meeting of September 17, 1947 requested me to ask your opinion on the following:

Section 153 of the Charter as amended and ratified by the Legislature on January 7, 1947 provides:

> 'Any officer or employee on military leave, who, prior to such leave, has been appointed to a permanent position in the city and county service, shall be entitled to resume such position at the expiration of his leave, and in determining and fixing rights, seniority, salary and otherwise, which have accrued and shall inure to the benefit of such officer or employee, the term of military leave shall be considered and accounted a part of his service under the city and county.
>
> . . . . . If while in said military service the names of such persons are reached for certification to permanent positions, appointments shall be made to serve until such persons in the military service shall present to the civil service commission an honorable discharge or certificate of honorable active service within the period of time and subject to the conditions as prescribed by rules of the civil service commission, but not more than one year after the date of discharge of each such eligible, when they shall be certified and assume the duties of positions in said class and their certification to said positions for all purposes of seniority shall be deemed to be the date when their names on such eligible lists were reached for certification, provided . . . .'

[illegible] to said positions
for all purposes of seniority shall be deemed
to be the date when their names on such eli-
gible lists were reached for certification,
provided . . . .'

1 - If an employee is permanently employed in one department in a specific class and is on a list of eligibles in a higher classification and said employee's name is reached on the second list while he is on military leave, is the employee entitled to participate in the retirement system under Section 161, at the higher rate of salary on the date his name is reached on the list or must he await until he returns and is actually employed in the higher classification?

2 - If an employee's name is reached on a civil service list while he is in the military service, is he eligible to become a member of the Retirement System while in the military service and contribute in accordance with Section 161 on the date his name is reached or must he await until he returns and assumes the position?"

(You have informed me that the word "employees" in question 2 should read "persons".)

OPINION

1. Sections 153 and 161 of the Charter both deal in part with veterans' rights. Section 153 is under the Civil Service division of the Charter and deals generally with leaves of absences, military and otherwise. Section 161 is a specific section under the Retirement division of the Charter setting forth the employees' rights under the retirement system while absent on military leave. The provisions of Section 161, so far as pertinent to your inquiry, are as follows:

"Any contributing member of the retirement system who is absent after September 14, 1940, from the service of the city and county, by reason of service in the armed forces of the United States, or the State of California or service on ships operated by or for the United States government, and for such time thereafter as may be provided by rule of the civil service commission, but not to exceed two years after the proclamation of peace, except in case of disability incurred in the line of duty with said armed forces or on said ships when such disability extends beyond such period, or any service connected with the war effort for which leaves of absence shall be authorized pursuant to section 153 of the charter, or any such member who is absent after September 14, 1940, from the service of the city and county, by reason of an order of the government of the United States or the State of California, or by lawful order of any of the departments or officers of said governments, may elect to contribute to said retirement system while serving in said forces or on said ships, and at times and in a manner to be fixed by the

retirement board, amounts equal to the contributions which he would have made from the beginning of said absence, or from the date of said election, had he remained on duty in the position he occupied and at the compensation being earned by him immediately prior to the beginning of said absence. The city and county shall contribute to the retirement system on account of any member who exercises affirmatively the election provided herein, and on account of any non-contributing member who is absent by reason of service stated in this paragraph, in the same manner and amounts as if said member were not absent in said service. If the member's base pay in said service shall be less than one hundred dollars per month, city and county, in lieu of said member, shall contribute also said amount which the member otherwise would have been required to contribute under said election, and said contributions shall be administered as if made by said member.

It is the purpose of the paragraph next preceding, to place a member who is absent from the service of the city and county by reason of service as set forth in paragraph next preceding, and who contributes or for or on account of whom contributions are made as herein provided, in the same status under the retirement system, as that which he would have occupied had he remained on duty in the position he occupied immediately prior to the beginning of said absence and charter and ordinance provisions governing the retirement system, shall apply to said member with like effect as if he were not absent."

These provisions indicate a specific intent that employees on military leave are to contribute to the retirement system during the term of their leave on the basis of the compensation earned in the position occupied immediately prior to the beginning of said leave. Section 153 impels no different conclusion. This section provides in effect that a person who is on military leave at the time his name is reached for certification shall be certified upon his return from military leave as of the date his name was reached and that date shall be used for all purposes of <u>seniority</u>.

The term "seniority" implies the right of employees who have served longest to a preference as respects continuance of employment and promotion and I do not believe it could be construed to extend to the rate of contribution to the retirement system.

To the extent that the terminology of Section 153 may create a seeming inconsistency between the two sections the specific language

of Section 161 would control under the general rule of statutory interpretation that specific sections on a specific subject control any general section not limited to that particular subject matter.

WHITTEMORE v. SYBEL, 74 Cal. App. (2d) 109.

"The specific provisions of a statute relating to a particular branch of a subject must govern that branch as against the general provisions in other parts of a statute."

You are therefore advised in answer to your first question that it is my opinion that the employee is not entitled to participate in the retirement system under Section 161 at the higher rate of salary on the date his name is reached on the list but must wait until he returns and is actually employed in the higher classification.

2. The consideration for the establishment of pension systems is to encourage public officers and employees to continue in the service of the government and to ensure or safeguard such officers or employees against a possible condition of penury and want, when, after giving the best part of their lives, both in point of time and service and ability to the service of the public, are no longer able to perform to the degree required, labor of any character or kind. (DOUGLAS v. PENSION BOARD, 75 Cal. App. 340) The right to participate in a pension system derives from one's status as an employee and is an implied part of the contract of employment.

In the case of DOUGLAS v. PENSION BOARD, 75 Cal. App. 335, it was held that a pension system is a part of the compensation of a public officer.

Section 165 of our charter under the retirement provisions provides that "the system shall be applied to such offices, departments, bureaus or classes of officers or employees of the City and County as the supervisors shall determine."

The foregoing indicates that the benefits of the retirement system are to be extended to officers and employees. To extend them to one not yet an employee would require at least a clear expression of legislative intent. No such expression can be found in Section 153. That section gives retroactive seniority in the ordinary meaning of the term to a person in the military service on an eligible list when he ultimately accepts employment with the city, but there is no basis for construing it to extend retirement benefits to those not yet employees of the city and who may never become employees. Such a construction would not only be unreasonable but would also raise a serious question of constitutionality in view of the contributions by the city and the constitutional inhibition against the gift of public money. It is to be noted under Section 161 of the charter that if the person in the military service receives less than $100.00 per month the city

contributes the member's share in addition to its own contribution.

In the case of LAMB v. BOARD OF PEACE OFFICERS, 29 Cal. App. (2d) 348, it was held that a pension is a gratuity when it is granted for services rendered when there was no retirement act in force and that a statute attempting to make a retirement act retroactive to cover such services was in violation of Sections 31 and 32 of Article IV of the Constitution of the State of California. I believe the same principle would be applicable to this situation where the city would be making contributions to a pension on behalf of one not yet an employee of the city and who has yet to render any service at all to the city.

You are therefore advised in answer to question 2 that it is my opinion that the person in the military service on an eligible list must wait until he returns and assumes the position before he is eligible to become a member of the retirement system.

Respectfully submitted,

CITY ATTORNEY

Retirement Board

TJB

October 14, 1947

SUBJECT: INTERPRETATION OF COMMUNITY REDEVELOPMENT ACT.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"The City Planning Commission would appreciate an opinion from you interpreting the meaning of the word "rehabilitation" as used in the Community Redevelopment Act, Chapter 1326, Statutes of 1945. Throughout this Act the word "rehabilitation" is coupled with the word "redevelopment", but nowhere in the Act is the word "rehabilitation" specifically defined. The nearest that the Act comes to a definition is the phrase "modernize or rehabilitate" in the seventh paragraph of Sec. 2, Article 2.

"The title of the Act reads thus: "An act relating to land use and development, including particularly the rehabilitation and redevelopment of blighted areas etc."

"In Article 2, Sec. 2, last paragraph, the Act states, ". . . . it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes and to provide a means whereby the blighted areas within this State may be redeveloped or rehabilitated; etc."

"In Article 3, Sec. 14, the Act states that "Redevelopment" means the planning, development, replanning, redesign, clearance, reconstruction or rehabilitation, or any combination of these, of a redevelopment area or part thereof, etc."

"Article 8, Section 44 (f) lists the following power of redevelopment agency: "To prepare from time to time plans for the improvement and rehabilitation of blighted areas."

"City planning commissions throughout the United States makes a distinction between redevelopment and rehabilitation. Redevelopment is thought of as the clearance and more or less complete rebuilding of blighted or slum areas. Rehabilitation is thought of as the repair, modernization, or general improvement of buildings that warrant continued use, provided certain structures in an area can be removed to provide some open space, adequate access to buildings, and sufficient parking for cars. The City of Boston, for instance, has issued companion reports, one proposing redevelopment or clearance schemes, the other proposing a rehabilitation scheme - repair and modernization of old structures that are generally sound and can be used for several decades.

"The California Community Redevelopment Act specifically prohibits the redevelopment agency from constructing buildings for any purpose. It also states, in Article 8, Section 44 (j) that "Nothing herein contained shall authorize such redevelopment agency . . . to acquire, without the consent of the owner, any real property on which buildings are located, where such buildings are to be continued in their present form and use under the redevelopment plan."

"Does this provision prohibit the agency from undertaking a modernization program in an area containing older structures that could continue in use if modernized and brought up to standard as to sanitation facilities and the elimination of fire hazards? Does it prevent the agency from undertaking a combination of redevelopment (clearance and new construction) and rehabilitation (repair and mdernization of older buildings that are generally structurally sound), under eminent domain proceedings? Would modernization of a building be considered a sufficient change in its "form" to authorize a redevelopment agency to acquire property without consent of the owners, or does the phrase "form and use" entirely rule out this possibility?

"In the meaning of this Act is an area deemed rehabilitated when it is redeveloped? The Act uses the combination "rehabilitation and redevelopment" in some places, while in others it uses the phrase "redeveloped or rehabilitated".

"The Commission will be grateful to you for clarification of the question of whether or not a redevelopment agency may undertake both redevelopment (clearance and reconstruction) and rehabilitation (minimum clearance, extensive modernization)."

O P I N I O N

From a reading of the Community Redevelopment Act as a whole, it appears to me that it was only intended to allow the power of eminent domain to be used for the "redevelopment" of blighted areas.

It will be noted that in the legislative declaration (Article 2, Sec. 2) reference is made only to the "redevelopment" of blighted areas; and in the declaration of the policy of the state (Article 2, Sec. 2(d)) it is stated to be the state's policy "to protect and promote the sound development and redevelopment of blighted areas "within the state; and again in defining the powers of the Redevelopment Agency (Art. 8, sec. 44 (d)) it is provided that for purposes of "redevelopment" the agency may rent, maintain, manage, operate, repair, and clear, such real property; and finally in the Restrictions on the redevelopment agency (Art. 8, sec. 44 (j)) we find the following statement:

"(j) Nothing herein contained shall authorize such redevelopment agency to construct any of the buildings for residential, commercial, industrial, or other use contemplated by the redevelopment plan, or to acquire, without the consent of the owner, any real property on which buildings are located, where such buildings are to be continued in their present form and use under the redevelopment plan."

You state that City Planning Commissions throughout the United States made a distinction between "redevelopment" and "rehabilitation"; that "redevelopment" is thought of as the clearance and more or less complete rebuilding of blighted or slum areas, while "rehabilitation" is thought of as the repair, modernization, or general improvement of buildings that warrant continued use.

In the Community Redevelopment Act, and particularly in the light of its restriction against the use of the redevelopment agency, "where such buildings are to be continued in their present form and use under the redevelopment plan" (Article 8, sec. 44 (j)), only "redevelopment" in the technical sense is intended, and any use of the word "rehabilitation" was a mere loose use of the word.

I do not believe that the Act permits the redevelopment agency to undertake the remodeling and modernization of buildings if they are to be continued in essentially the same form and use as before.

Respectfully submitted,

CITY ATTORNEY.

To: City Planning Commission
MSW

October 15, 1947.

SUBJECT: In re Statute of Limitations on Bonds and Coupons of the Municipality under Recent Amendment to Section 337.5 of the Code of Civil Procedure.

Dear Sir:

I have your letter reading as follows:

"It has been the policy of this department in paying coupons of the City and County of San Francisco, if they are found to be four years old, a resolution is adopted by the Honorable Board of Supervisors waiving the statute of limitations of the State of California as to the payment of such coupons, and permitting the Treasurer to pay the same.

"At the session of the California Legislature just adjourned, Assembly Bill No. 2124 was passed and signed by the Governor.

"I would ask you to give your attention to this bill and let me know if the payment of coupons of the City and County of San Francisco can now be carried on for ten years.

"We now have on hand a number of coupons received from the various banks that are over four years old, and I do not like to keep them too long before they are paid."

OPINION

Section 337.5 of the Code of Civil Procedure was amended at the 1947 session of the State Legislature and it now reads as follows:

"Subdivision 2 of this section supersedes all existing statutory provisions inconsistent herewith, but if a longer period than that herein prescribed is provided elsewhere by the statutes for commencing an action upon such bonds or coupons and the first 10 years of said period has expired on the effective date of this act, but where the whole of said period has not run, then such action may be commenced either within one year after the effective date of this act or within the period provided in the existing statute of limitations applicable to such bonds and coupons, whichever is shorter."

Under the above provisions of the amendment the time for the commencement of an action to recover on bonds or coupons issued by the City and County of San Francisco is ten years from the date of the specified maturity of the bond or coupon.

I take it that on the bonds or coupons which you are holding the amounts payable are all due and there is no necessity to give consideration to any extension of time by reason of any amounts becoming due in the future.

You are therefore advised that in my opinion the four year statutory provision contained in Section 337 of the Code of Civil Procedure does not apply and the statute does not begin to run against the bonds or coupons until ten years after the date of their maturity.

Respectfully submitted,

CITY ATTORNEY

Treasurer

JJO'T

October 17, 1947

SUBJECT: SALE OF SURPLUS AND DISTRESSED DRIED FRUITS, HONEY AND NUTS IN THE FARMERS' MARKET.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"Attached hereto please find copy of Bill No. 4966 (Series of 1939) which, if enacted, will permit the sale of dried fruits, honey and nuts in the Farmers' Market.

Pursuant to the direction of the Board of Supervisors, you are hereby requested to furnish the Board with your written opinion as to whether the proposed expansion of activities is legally proper."

OPINION

This opinion is confined to the subject suggested in your letter, to wit, whether the Farmers' Market may expand its activities by providing for the sale of surplus or distressed dried fruits, honey and nuts.

The Board of Supervisors originally provided for the sale of surplus or distressed fresh fruits and vegetables, and the proposed ordinance provides for the sale of surplus or distressed fresh fruits, vegetables, dried fruits, honey and nuts.

The case of BANK v. BELL, 62 Cal. App. 321, which was decided on May 29, 1923, used the following language on page 330:

"The decision in this case turns upon the answer to the question which now presents itself to us: Is the establishment, maintenance, equipment, ownership, and operation of the 'Berkeley Municipal Market' a municipal affair?

In defining a 'municipal affair' it has been said that 'the true test is that which requires that the work should be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the

people of the city at large. Within that sphere of action novelty should impose no veto.' (Sun Printing etc. Assn. v. New York, 8 App. Div. 230, 238, 40 N. Y. Supp. 607, 611, 612); Id., 152 N. Y. 257, 37 L. R. A. 788, 46 N. E. 499.)

Time was when the sale of light and water to the public was attacked in the state of New York because it was thought not to be within the purview of the municipal powers of the city. The idea was then something new and it met with opposition. It was contended that the business that the city proposed engaging in was of a private, commercial nature, and that therefore the municipality was debarred from entering upon it. The case is to be found in 49 Hun, 550, 2 N. Y. Supp. 447), and is entitled Hequenbourg v. City of Dunkirk et al. In declaring the business a public use, the court said: 'What is or what is not a municipal purpose is in many cases doubtful and uncertain, and it is the duty of the court in such cases to give weight to legislative determination, and not to annul its acts, unless it clearly appears that the act was not authorized.'

In Laughlin v. City of Portland (1914), 111 Me. 486 (Ann, Cas. 1916C, 734, 51 L. R. A. (N. S.) 1143, 90 Atl. 318), the court said: 'The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today . . . What could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now . . .'"

And on page 332 the court made the following observation:

"Mr. Justice Oliver Wendell Holmes, Jr., in Opinion of Justices, 155 Mass. 607 (15 L. R. A. 809, 30 N. E. 1146) said: 'I am of the opinion that, when money is taken to enable a public body to offer to the public, without discrimination, an article of general necessity the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the legislature to enact the laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider.'"

See also:

IN RE ANDERSON, 130 Cal. App. 395.

You are therefore advised that there is no legal objection to the Board of Supervisors providing for the sale of surplus and distressed dried fruits, honey and nuts in the Farmers' Market.

Respectfully submitted,

CITY ATTORNEY

Board of Supervisors

4070

October 21, 1947

SUBJECT: Licensing of Private Hospitals

Dear Sirs:

I have your request for an opinion as follows:

REQUEST

"In view of your opinion dated March 7th, 1947 to the Department of Public Health relative to hospitals, is the license ordinance governing Private Hospitals under Section 126, Article 2, Part III of the Municipal Code still in effect?"

OPINION

I advise you that the portion of the Municipal Code referring to the license ordinance governing private hospitals in Section 126, Article 2, Part III, is no longer in effect.

With the passage of Sections 1400-18, inclusive, of the Health and Safety Code, the matter of the control and licensing of private hospitals comes under the jurisdiction of the State, and any provisions in charters or local laws covering this subject were impliedly revoked by the passage of the state law creating these new sections.

See:

Pipoly v. Benson, 20 Cal. 2d 366,

Horwith v. City of Fresno, 74 Cal. App 2d 444.

Respectfully submitted,

To: TAX COLLECTOR
via Chief Administrator.

CITY ATTORNEY.

BJWJr.

40-21

October 28, 1947

SUBJECT: AUTHORITY OF HEALTH SERVICE SYSTEM TO GRANT EXEMPTION.

Gentlemen:

This office is in receipt of a request for an opinion as follows:

"The Health Service Board is submitting a request for your opinion on its power under the Charter to administer the Health Service System in accordance with certain demands made by the San Francisco County Medical Society (representing its professional staff), as follows:

"To permit the employee-member of the Health Service System to elect:

"'1. To make provision for his medical care with his own doctor.

"'2. To join a voluntary health insurance system with indemnity cash payments to help defray his medical and hospital bills.

"'3. To enroll as a member of a voluntary medical and hospital service plan which will provide him with health care in time of illness.'

"At a meeting of a committee of the Health Service Board with a committee of the County Medical Society Board of Directors, on Friday evening, October 24th, the first point quoted above was clarified by the Society as meaning that this board would exempt from the Health Service System any employee of the City or School Department who asked for exemption on assurance that he wished to make his own arrangements for medical care with his own physician.

"The Board of Directors of the San Francisco County Medical Society claim that 911 resignations of Health Service professional staff members are in their hands, which will be presented en masse on November 10th unless satisfactory negotiations toward the accomplishment of the above provisions are under way.

"We therefore ask for your opinion as to whether or not this Board has the power to grant exemptions as stated in the sixth paragraph hereof without nullifying the spirit and terms of Section 172.1 of the Charter.

"Inasmuch as the continuation of the present system is at stake and the time is very short for consideration of and action upon these demands, we are asking that, if it is at all possible, your opinion be in our hands for the meeting of the Health Service Board tomorrow night, October 28th."

O P I N I O N

The pertinent portion of Section 172.1 of the Charter of the City and County of San Francisco reads as follows:

"The board shall have the power to exempt any person whose annual compensation exceeds forty-five hundred dollars ($4,500) and any person who has otherwise provided for adequate medical care."

The case of Butterworth v. Boyd, 12 Cal. (2d) 140, makes the following observation on page 148:

"There can be no question, under these authorities, of the power of the city to establish a system of medical service for its employees or their dependents. Proper medical attention, freely available to all such employees and such dependents, should have a direct and beneficial effect on their health, and therefore their efficiency. If a pension or retirement system, or provision for sick leave payments at the expense of the municipality is within the municipal power, the present plan, entirely self-supporting, and having a tendency to decrease sickness and lessen the expense of sick leave must equally be so.

"With the municipal power to act in this field established, there remains only to consider briefly the specific details in which the plan is said to be invalid.

"First it is contended that the charter sets up no standard for the expression 'adequate medical care', in its provision for exemption of those who are already provided with such care. The contention is made that the lack of criteria for determining this question leaves the matter within the uncontrolled discretion of the board, which may destroy the whole plan by broadening the grounds of exemption, or may discriminate among the employees. It may be observed at the outset that at most this argument challenges the validity of this particular exemption provision alone, and is in no sense an attack on the system itself. The system is applicable to the great majority of the city's employees, and

the comparatively few exemptions could be severed without destroying the general plan. (See Bacon Service Corp. v. Huss, 199 Cal. 21 [248 Pac. 235]; 22 Cal. L. Rev. 228.) But in truth the term is clear enough. As defined in subdivision 5 of the charter (see supra) it refers to the treatment by licensed doctors, etc., and in view of the great complexity and rapid changes in medical science it is neither desirable nor possible to set forth in a statute any detailed outline of particular services. This is one of the innumerable situations in which only the broadest type of standard may be stated, and the details must be left to the expert administrative board or officer chosen to carry out the legislative direction. Terms equally general have been frequently upheld against objections of uncertainty, and standards equally broad have been sustained against the objection of undue delegation of legislative power. (See People v. Globe Grain & Milling Co., 211 Cal. 121 [294 Pac. 3]; Tarpey v. McClure, 190 Cal. 593 [213 Pac. 983]; People v. Monterey Fish Products Co., 195 Cal. 548 [234 Pac. 398, 38 A.L.R. 1186]; Dominguez Land Corp. v. Daugherty, 196 Cal. 468 [238 Pac. 703]; 19 Cal. L. Rev. 448; 15 Cal. L. Rev. 408.)"

and on page 151 the court said:

"And the exemption of those who already have adequate medical care avoids the arbitrary imposition of the facilities of the system upon those who already have provided for equal facilities from another source."

It will be noted that the Charter as well as a statement of the court authorizes the Health Service Board to grant an exemption only when it feels that the employee has adequate medical care. As stated by the court in its decision the plan tends to decrease sickness and lessen the expense of sick leave.

The queries will be answered in the order of their presentation.

1) To make provision for his medical care with his own doctor.

It is not believed that an employee who makes provision for his medical care with his own doctor would properly come within the mandate that he must have provided for adequate medical care. It must be presumed that most employees had their own doctor previous to the enactment of the Health Service System. It is evident therefor that the Health Service System intended to make provisions for medical care other and different than the employee already had. Provision was therefore made for doctors, hospitalization, x-rays, physiotherapy, laboratory work, etc. Exemptions were in-

tended for those employees who have made provision for treatment as described above.

2) To join a voluntary health insurance system with indemnity cash payments to help defray his medical and hospital bills.

It is somewhat difficult to answer this query inasmuch as one cannot exactly visualize what is meant "to help defray his medical and hospital bills." The Charter explicitly provides that the employee must have provided for adequate medical care. Should the indemnity cash payments take care of his expenses thus providing him with adequate medical care, the Health Service Board is empowered to grant an exemption. Should the indemnity cash payments be not sufficient to allow the employee adequate medical care, the Health Service Board would not be empowered to grant the exemption.

3) To enroll as a member of a voluntary medical and hospital service plan which will provide him with health care in time of illness.

Should the voluntary medical and hospital service plan mentioned in this query be sufficient in the opinion of the Health Service Board to give the employee adequate medical care, the Health Service Board is empowered to exempt the employee.

The Health Service Board has the discretion to determine what constitutes "adequate medical care". In defining this term, however, it would be an abuse of discretion to determine that certain services would constitute "adequate medical care" when, as a matter of fact, the indicated services would not constitute medical care which was adequate.

Respectfully submitted,

CITY ATTORNEY

To: Health Service System
RJB

40 2 2

October 27, 1947

SUBJECT: CLAIMS, JUVENILE COURT, VACATION OR SUSPENSION OF, BY COURT: REFERRAL TO BUREAU OF DELINQUENT REVENUE.

Dear Sir:

I have your request for an opinion as follows:

"The Juvenile Court makes orders requiring parents to reimburse the City and County of San Francisco for moneys expended from the Maintenance of Minors' Fund for the support of children who are wards of the Court. It sometimes develops that such pay orders against parents are not met due to circumstances which need not be mentioned here, and when the Court is satisfied that there is good cause therefor, an order is made either suspending or vacating accrued past indebtedness. In this particular type of situation the indebtedness still remains within the purview of the Collection Division of the Juvenile Court Probation Office -- it has not been forwarded to the Bureau of Delinquent Revenue for collection.

"The following is a typical example of this procedure: On June 1, 1947, John Doe, Jr., is made a ward of the Juvenile Court and committed to the Chief Probation Officer for foster home placement at $40.00 per month (to be withdrawn from the Maintenance of Minor Fund). The parents are ordered to reimburse the County in the amount of $40.00 per month. Soon thereafter, however, financial circumstances in the home take a turn for the worse, precluding fulfillment of the pay order and, by September 1st. the debt has accrued to the sum of $120.00. The Court, learning of the family's financial distress and believing that there is little hope that the indebtedness can be met in the future, makes an order vacating or suspending the parents' pay order retroactive to June 1st.

"This Office will appreciate an opinion as to the legality of this procedure."

OPINION

The question presented in your letter is as to the legality of your existing procedure in keeping accounts for past due indebtedness which has been vacated or suspended by order of the Juvenile Court within the purview of the Collection Division of the Juvenile Court or whether such accounts must be referred to the Bureau of Delinquent Revenue Collection to be handled in accordance with the provisions of Ordinance No. 9.0231 providing for the collection of delinquent revenue and Section 26 of the Charter relating to the settlement or dismissal of litigation.

There can be no question of the power of the Juvenile Court to vacate or suspend its order as that power is specifically granted it by Section 863 of the Welfare and Institutions Code which provides that the Court may at any time set aside, change or modify any order for payment.

Section 26 of the Charter provides:

"Except as otherwise provided in this charter he (City Attorney) shall not settle or dismiss any litigation for or against the City and County unless upon his written recommendation he is ordered so to do by Ordinance."

The order of the Juvenile Court directing payment for the support of the ward is a judgment of that court upon which execution can be issued. As Section 26 of the Charter provides only for matters in litigation and does not make any provision whatsoever with respect to judgments, it has no application to this situation.

Section 2 of Ordinance No. 9.0231 provides that the head of each department shall report all accounts receivable uncollected for a period of 90 days to the Bureau of Delinquent Revenue Collection. Section 3 of the ordinance provides that the Bureau shall energetically prosecute the collection of all claims for money due. Section 4 provides for the abandonment or compromise of such claim by the Bureau with the approval of the Controller.

It is obvious that these sections of the ordinance contemplate a referral of existing claims where there is a legal debt owing and a legal obligation to pay such debt. If the Juvenile Court in the exercise of the power granted it by the Welfare and Institutions Code vacates an order effective as of the date of its issuance, it annuls the legal obligation to pay and hence there is no occasion for referral of the matter to the Bureau of Delinquent Revenue Collection. There is no claim and nothing upon which the Bureau can act. The same applies in the case of a suspension which has the effect of removing the legal obligation to pay during the period of the suspension.

You are therefore advised that it is my opinion that your existing procedure is legal and that such matters need not be referred to the Bureau of Delinquent Revenue Collection.

Respectfully submitted,

CITY ATTORNEY

To: Chief Probation Officer

TJB

October 30, 1947

SUBJECT: FIRE DEPARTMENT SALVAGE CORPS;
OFFICER'S CREDIT FOR PROMOTION;
FIRE DEPARTMENT LIEUTENANTS.

Dear Sirs:

I have your request for an opinion as follows:

R E Q U E S T

"The Commission at its meeting of October 9, 1947 ordered that you be asked to advise with respect to the following question affecting eligibles holding eligibility on both lists of H20 Lieutenant Fire Department and H206 Lieutenant Salvage Corps.

"Subdivisions 'E' and 'F' of Section 146 of the Charter provide a method of computing credits for seniority of service in promotive examinations from H2 Fireman to H20 Lieutenant Fire Department, and from H20 Lieutenant Fire Department to H30 Captain Fire Department.

"In the event a man employed as H2 Fireman Fire Department and who is an eligible H20 Lieutenant Fire Department and H206 Lieutenant Salvage Corps, accepts appointment from the latter list, will he be given full credit for his service in the Salvage Corps in the event he later qualifies for promotion in the Fire Department?

"Under your opinion of September 22, 1947, after accepting appointment as H206 Lieutenant, Salvage Corps, the employee may either relinquish and return to his position of H2 Fireman Fire Department or accept appointment from the eligible list of H20 Lieutenant Fire Department, - in either of which events he would be qualified for the promotion mentioned above."

O P I N I O N

In order that a member of the Fire Department may become a member or officer of the Salvage Corps, he must be examined and certified by the Civil Service Commission (See Section 30.1 of the Charter. In order to again become a member of the Fire Department, he must vacate his appointment with the Salvage Corps. (See City Attorney's Opinion, September 23, 1947.) If he is a lieutenant in the Salvage Corps, and desires to take an appointment from a list of eligibles as lieutenant in the Fire Department, he cannot claim continuity in the office of lieutenant. Inasmuch as

he must vacate his position as Lieutenant-Salvage Corps before he may accept an appointment as Lieutenant-Fire Department, he starts anew as of the date of his appointment to Lieutenant-Fire Department. The provisions of Section 35.1 of the Charter prevent any accummulation of service in rank, between the Salvage Corps and the Fire Department.

The method through which a former member of the Fire Department, who has accepted appointment as Lieutenant-Salvage Corps, secures his appointment as Lieutenant-Fire Department, is through his vacating the office of Lieutenant-Salvage Corps and momentarily returning to Hoseman-Fire Department, from which rank he is promoted to Lieutenant-Fire Department. He is not transferred directly from Lieutenant-Salvage Corps to Lieutenant-Fire Department.

The eligible who is appointed in the manner prescribed in your request should be given credit as provided in Section 146, subdivisions (f) and (g) of the Charter, as a member of the Fire Department for the period that he holds the position Lieutenant-Salvage Corps, but no additional credit in future promotional examinations in the Fire Department while serving as Lieutenant-Salvage Corps.

I therefore advise you that members of the Fire Department who accept appointments as Lieutenant-Salvage Corps are not entitled to receive additional credits in future promotional examinations, as provided in Section 146, subdivisions (f) and (g) of the Charter, for their service as lieutenants, when they are seeking further promotion in the Fire Department.

Very truly yours,

JOHN J. O'TOOLE
City Attorney

TO: CIVIL SERVICE COMMISSION.

(BJWJr.:db)

October 30, 1947

SUBJECT: CANVASSING OF RETURNS AT ELECTIONS; DUTY OF BOARD OF SUPERVISORS; AND REGISTRAR OF VOTERS.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"In view of the apparently conflicting provisions of the charter and the Elections Code of the State of California, you are hereby respectfully requested to furnish the undersigned with your opinion as to the proper procedure to be followed in accomplishing the canvass of votes cast at elections held in the City and County of San Francisco.

"Section 9 of the Charter reads in part as follows:

"'It shall be the duty of the board of supervisors to canvass the vote cast at each election in the City and County and certify the official count of such balloting.'

"Section 173 of the Charter reads in part as follows:

"'The conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the city and county shall be vested exclusively in the registrar of voters.'

"Section 174 of the Charter reads in part as follows:

"'All provisions of the general laws of this State, including penal laws, respecting the registration of voters, initiative, referendum and recall petitions, elections, canvass of returns and all matters pertaining to any and all of these shall be applicable to the city and county, except as otherwise provided by this charter or by ordinance adopted by the board of supervisors as authorized by this charter relative to any rights, powers or duties of the city and county or its officers.'

"Division 9, Chapter 7, Article 1, Section 7921, of the Elections Code of the State of California, pertaining to other than primary elections reads as follows:

"'7921. MEETING OF COUNTY ELECTION BOARD.

"'(Time and place.) The election board of each county shall meet, at its usual place of meeting, on the first Monday after each election.

"'(Duties.) If, at the time of the meeting, the returns from each precinct in the county in which polls were opened have

been received, it shall then and there do one of the following.
(a) Canvass the returns.
(b) By resolution duly adopted and entered on its minutes, order the canvass made immediately by the county clerk. (Canvass by registrar of voters.) In any county having a registrar of voters, except a city and county, the canvass of the returns shall be made by the registrar of voters and it shall be unnecessary for the election board to meet as hereinabove provided. The registrar of voters shall perform the duties of the election board or board of supervisors as provided in this article.'

"Division 9, Chapter 7, Article 1, Section 7961, of the Elections Code pertaining to primary elections, reads as follows:

"'7961. MEETING TO CANVASS: TIME AND PLACE: COUNTIES WITH REGISTRAR OF VOTERS. The board of supervisors of each county, or in the case of a city or municipal primary election, the officers charged by law with the duty of canvassing the vote therein, shall meet to canvass the returns at the usual place of meeting, or at any other place permitted by law, at 1 o'clock in the afternoon of the first Thursday after each primary election, or as soon thereafter as all the returns are in.

"'In any county having a registrar of voters, except a city and county, the canvass of the returns shall be made by the registrar of voters and it shall be unnecessary for the election board or board of supervisors to meet as hereinabove provided. The registrar of voters shall perform the duties of the election board or board of supervisors as provided in this article.'

"In connection with each election held in San Francisco, the practice has been for the Board of Supervisors, by resolution (see sample copies attached hereto), to authorize the Registrar of Voters to canvass the votes cast thereat.

"Will you kindly indicate whether or not the past practice is in harmony with the several provisions quoted above, and if it is not, delineate the proper mode of procedure to be followed in the future, in order that the Board of Supervisors may properly discharge the duties delegated to it.

"Since the Board of Supervisors should adopt any resolution required of it in connection with the November 4th election not later than November 3rd, and committee consideration should be given to said resolution during the week preceding that date, it will be appreciated if you will furnish your opinion within the time limit specified."

O P I N I O N

Your request is directed to the election to be held on November 4, 1947, which consists of a general municipal election, a special municipal election and a special assembly district election and my opinion is therefore restricted to the procedure to be followed in connection with the election to be held on November 4th. Certain pertinent sections are quoted in your request and for this reason will not be quoted in this opinion.

Section 9 of the Charter provides that it shall be the duty of the Board of Supervisors to canvass the vote cast at each election in the City and County of San Francisco and to certify the official count of such balloting. Section 7921 of the Elections Code provides that the election board of each county, which means the board of supervisors, shall meet, at its usual place of meeting on the first Monday after the election and if at the time of the meeting, the returns from each precinct in the county in which polls were open have been received, it shall then and there do one of the following: (a) canvass the returns; or (b) by resolution duly adopted and entered on its minutes order the canvass made immediately by the county clerk. Section 17 of the Elections Code provides:

> "'County clerk' means 'registrar of voters' in those counties in which the latter office has been established."

In view of the above sections, I am of the opinion that the Board of Supervisors may delegate the clerical work of canvassing the returns to the registrar of voters and require the registrar of voters to report to the Board of Supervisors on the results of the canvassing of returns, so that the board may certify the official count of the balloting and officially conclude the canvass. It will be noted that the resolution should be adopted after the election rather than prior to the election as has been the custom heretofore.

You are therefore advised accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Clerk, Board of Supervisors
LSM

November 5, 1947

Subject: STREET EXCAVATION, SEPARATE PERMIT AND INSPECTION FEE REQUIRED FOR EACH UNDER PUBLIC WORKS CODE SECTION 353.

Dear Sir:

You have requested my opinion as follows:

"I would be pleased to have an opinion as to the proper interpretation of Section 353 of the Public Works Code with reference to the questions raised in the attached communications, which are listed for reference, as follows:

Opinion of Law Department, Pacific Gas & Electric Co., on the subject 'San Francisco Street Excavation Fees,' dated August 27, 1947.

Letter from Division Manager, Pacific Gas & Electric Co. to City Engineer, dated September 20, 1947.

Letter from City Engineer to Division Manager, Pacific Gas & Electric Co., dated October 6, 1947.

"The question involved is becoming particularly important because the company is undertaking a rather extensive program of installing leak clamps on their gas mains throughout a large part of the City. This makes it necessary to open the street and put down an excavation to a considerable depth at each joint in the pipe. These joints may be as close as 12 feet, in which case there would be approximately 16 excavations in a length of 200 feet. It should be understood that these openings are all made in order to repair a continuous length of pipe and that a continuous open trench might be excavated to obtain the same result except for increased cost.

"It is our belief that a strict interpretation of Section 353 of the Public Works Code would require us to collect an inspection fee of $1.50 for each of the separate openings, or a total fee of $24.00 for the openings in a length of 200 feet. The Power Company, however, contends that the fee for the 16 openings should be the same as it would be if the opening were a continuous one for the full 200 feet, in which case we agree that only a single fee would be charged.

"The statement of the company's law department contains two paragraphs which this office is not in

complete agreement with, namely, the last paragraph on page 2 and the first paragraph on page 3. Contrary to the statements made therein, our experience shows that a series of separate openings requires more inspection service and results in a much less perfect street surface than is the case when a continuous trench is opened. The inspection of the separate openings may require several trips to the job since notall of them are necessarily filled at the same time. Our experience with work performed by both the Power Company and the Water Department shows that it is very difficult to restore the street surface to satisfactory condition after a number of intermittent openings have been made, and in several cases it has been necessary to require removal and replacement of such repaving jobs subsequent to the original work. In one case it was necessary to require removal and replacement twice. This, of course, results in additional interruption of traffic and additional inspection on our part.

"It is our opinion that on an average the cost of inspecting intermittent openings at a given location may be several times the cost of inspecting an individual location. We agree with the Power Company officials that a fee of $24.00 for 16 openings in a single length of 200 feet would be in excess of our actual cost.

"I would very much appreciate your opinion on this matter since a number of applications for street opening permits submitted by the Power Company are now pending."

OPINION

The section of the Public Works Code in question reads as follows:

> SEC. 353. Definition of "Excavation" - Permit - Fees. For the purpose of this Article an excavation shall be defined as an opening in the street two hundred (200) feet or less in length, and each two hundred (200) feet or fraction thereof in excess of the first two hundred (200) feet shall be considered as a separate excavation, for which a separate permit shall be required and a separate charge made. Excavations for service connections made at the same time as and connecting with excavations for mains shall be charged for as an extension of the main excava-

tion with which they connect, and the calculation of charges based upon the aggregate length of main and connecting services. Service excavations not connecting with main excavations, however, shall be charged for as separate openings.

The language of the section clearly indicates that an excavation is an opening which may be as small as a few inches or as long as 200 feet. For such an excavation a permit is required and an inspection fee collected. It is my opinion that each separate opening in the street (except as limited in the foregoing code section) is an excavation for which a fee must be paid.

The position taken by the Pacific Gas & Electric Company is based on the promise that the supervisors intended to grant authority to make as many openings as needed within each 200 foot area and still pay a single inspection fee. I believe the contrary was intended, namely: that the distance named is designed as a limitation so that even though but a single continuous opening is made, for each 200 feet an inspection fee must be paid. The necessity of such a limitation is apparent, otherwise one excavating the street for several miles would only be required to pay a fee of $1.50.

The opinion of the legal department of the Pacific Gas & Electric Company indicates several grounds supporting their position.

(a) "Common sense", that these single excavations are less of a burden to inspect, and repairing the street is simpler.

(b) interpretation by administrative practice.

(c) collection of separate fees would be an unconstitutional exercise of the police power.

Your letter states that in fact multiple excavations in a limited area pose more of an inspection problem than a continuous trench. In addition, it is more difficult to restore the street to its former surface. The "common sense" solution therefore does not appear well-founded.

There would be merit in the second ground if there had been a practical administrative interpretation over a long period of time. You have advised me orally that this problem has developed within the last year or two. In addition, apparently any interpretation made was by a clerk in the Central Permit office and not by anyone in an executive capacity as a matter of policy. This would hardly be considered persuasive administrative interpretation.

The third ground that the interpretation of the ordinance to require a fee for each separate opening would render the ordinance unconstitutional is extremely doubtful in view of the circumstances.

It is my opinion, therefore, that each separate opening in the street requires a permit and a fee must be paid thereon.

Respectfully submitted,

City Attorney

To: Director of Public Works

GAH

November 6, 1947

SUBJECT: BURIAL OF UNCLAIMED DEAD.

Dear Sir:

You have previously requested an opinion from me as to whether it would be legal for the City and County of San Francisco to enter into a contractual arrangement with the San Francisco College of Mortuary Science for the handling of the unclaimed dead, the only interest of the College in entering into such an arrangement being the use of the cadaverous material for educational purposes in teaching the students for the funeral directors' profession.

On August 21, 1947, I advised you that such a contract would, in my opinion, be ultra viries and void for the reasons explained in the opinion. You then requested that I draw up legislation which would, if approved by the Board of Supervisors, make the proposed contract legal and I advised you that the matter of assigning the unclaimed dead for educational purposes having been regulated by the State, the County was without power to legislate on that phase of the subject.

You subsequently submitted your complete file on the matter, containing correspondence between the San Francisco College of Mortuary Science and various State officials and asked me to reconsider my opinion in the light of the complete facts set forth in the correspondence.

O P I N I O N

I have noted from the correspondence that all concerned feel that the proposed arrangement is a desirable one and has many advantages, both economically and from the standpoint of the advancement of medical science. I have, therefore, carefully reconsidered the entire matter and have again reviewed all the case law and text material that I could locate on the subject but I can arrive at no different conclusion than that expressed in my original opinion.

As I pointed out in that opinion, the City and County has been delegated the duty of burying the unclaimed dead by the Legislature and the Board of Supervisors have authorized the local Department of Public Health to contract for the service. Having the duty of burial, the City and County has the right of custody of the body but does not have such a right of property in it as would authorize any disposition of it other than that of interment.

Section 7102 of the Health and Safety Code provides as follows:

> "When a person is charged by law with the duty of interment he is entitled to the custody of the remains <u>for the purpose of interment</u>; except that in any case where a coroner is required by law to investigate the cause of death, the coroner is entitled to the custody of the remains of the person whose death is the subject of investigation until the conclusion of the autopsy or medical investigation by the coroner."

The following cases, while they do not involve the same factual situation as herein considered, do set forth the general rule with respect to the rights in a dead body possessed by those who have the duty of burying it.

Huntley v. Zurich Gen. Acc. and Liability Co., 100 Cal. App. 201:

"In the absence of a statutory provision, there is no property right in a dead body; and Section 294 of the Penal Code, (now 7102 of the Health and Safety Code) providing that a person charged by law with the duty of burying the body of a deceased person is entitled to the custody thereof for the purpose of burial, does not confer any property right."

Pettigrew v. Pettigrew, 207 Pa. 313:

"The law recognizes property in a corpse but property subject to a trust and limited in its rights to such exercise as would be in conformity with the duty out of which the rights arise."

Litteral v. Litteral, 11 S.W. 872:

"In the sense in which property is ordinarily used, one whose duty it becomes to bury a deceased person has no rights of ownership in the corpse; but in the broader meaning of the term he has a quasi property right therein which entitles him to possession and control of the body for the single purpose of burial."

Supervening the right of custody of the unclaimed dead for the purpose of interment is the paramount right of the State pursuant to its police power to assign those bodies it deems fit for the purpose to educational institutions to be used for the purpose of instruction and study in the promotion of medical, chiropractic and embalming education and science within the State.

As I previously pointed out, the Legislature, pursuant to this power, has set forth a complete system of regulation of the disposition of the unclaimed dead for these purposes in Sections 7200 to 7208 of the Health and Safety Code and has vested the power of such disposition in the State Department of Public Health. These sections of the Health and Safety Code are based on Chapter 624, Statutes of 1927, and the title of the original enactment is significant. It is as follows:

"An act to prevent the unauthorized use and disposition of and traffic in human bodies to prescribe the keeping of proper records to promote medical education and public health by regulating the disposition and utilization of the unclaimed dead to provide penalties for the violation of this act and to repeal sections 3094 and 3095 of the Political Code and all other acts or portions of acts in conflict with this act."

The disposition of the unclaimed dead for educational purposes having been regulated by the Legislature and the power vested in the State Department of Public Health, the counties are precluded from

exercising the same power and have a mere right of custody of the bodies for the purpose of interment. The City and County of San Francisco is, therefore, without power to enter into a contract that would authorize the use of the bodies for educational purposes. Whether or not it would be competent or legal for the State Department of Public Health to assign all the unclaimed dead within the jurisdiction of this City and County to the San Francisco College of Mortuary Science, to be handled as set forth in their June 5, 1947, letter, would be a matter between the College and the State Department and within the purview of the Attorney General to decide. It is my opinion that the City and County of San Francisco can not do so by contract.

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY

To: Chief Administrative Officer

TJB

November 10, 1947

Subject: REPORTERS' TRANSCRIPTS; PAYMENT FOR BY CONTROLLER.

Dear Sir:

I have your request for an opinion as follows:

"Will you please inform me as to how many copies and of the circumstances under which reporters transcripts may be ordered paid from the City and County Treasury under the State Law by

1. the Superior Court

2. the Municipal Court

"The 1947 changes in law make this inquiry necessary, particularly Chapter 1178 which repeals Section 1192a of the Penal Code."

OPINION

The basis for any payment for the purchase of a reporter's transcript ordered by the court out of City and County funds is found in Sections 269 to 274 inclusive of the Code of Civil Procedure, and Section 1218 of the Penal Code.

A reading of Sections 269 to 274 of the Code of Civil Procedure indicates that they apply to Superior Courts alone, but by virtue of the following language found in Section 274(c) of the Code of Civil Procedure they are made applicable to Municipal Courts.

> "Those sections of the Code of Civil Procedure of this State numbered 270 to 274, inclusive, are hereby made applicable to the qualifications, duties, official oath, certification of transcripts and fees of official reporters of municipal courts."

The rule, therefore, concerning payments by you in regard to the purchase of transcripts is the same for the Superior Court and the Municipal Court, with the exception that those matters provided under Section 274(a) of the Code of Civil Procedure which concern the transcription of opinions of the judge, etc. apply only to Superior Courts.

The controller has no authority in law to expend any sums of money out of the treasury of the City and County for the payment of any fees to reporters for transcriptions <u>in civil cases</u> (as distinguished from criminal cases) under the provisions mentioned above, except as provided in Section 274(a) of the Code of Civil Procedure.

I advise you, therefore, that in all criminal cases where the transcripts are ordered by the court pursuant to Section 274 of the Code of Civil Procedure or Section 1218 of the Penal Code, you are legally obligated to pay as follows:

1. For the original transcript to be filed with the court.

2. A copy of the transcript for the prosecuting attorney.

3. A copy for the defendant or, where there is more than one defendant, a copy for each defendant.

With the enactment of Chapter 1178 of the 1947 Statutes, Section 1192(a) of the Penal Code was repealed and therefore in the future will have no application to the subject matter - payment by the controller for transcriptions of court cases.

I have a copy of your Form P4271 and, on the basis of this opinion, I would advise the following changes: In the lower left-hand corner in the box commencing "To the Controller" the form should have the reference to Penal Code, Section 1192(a), removed. Also on the lower half of the form, entitled "per diem", this detail will no longer be necessary inasmuch as the reporters of both the Superior and Municipal Courts are now on a salary basis and are only entitled to their fees for transcriptions.

Respectfully submitted,

City Attorney

To: The Controller

BJW

November 12, 1947

SUBJECT: COMMUNITY REDEVELOPMENT ACT; Whether Jefferson Square Park may be used as project area for construction of housing under.

You have requested my opinion as follows:

REQUEST

"The special staff group that is preparing a tentative site plan for the first project area that would be redeveloped under the Community Redevelopment Act has worked out one plan which contemplates the erection of three-story multiple dwellings in the present Jefferson Square, a city park, and the continuation of the Margaret Hayweod Playground, in the blocks immediately south of Jefferson Square, in its present form. To compensate for loss of the park area, the plan shows a park development linking the playground with the present Raphael Weill School and with new small parks in other parts of the project area. In other words, the plan contemplates creation of even more park space in the project area than is now represented by Jefferson Square.

"We should appreciate having your legal opinion outlining the steps that would be necessary for a redevelopment agency to take to include the present Jefferson Square Park in land assembled for a project area, so that a private developer who purchased or leased the land might use the park for building sites. In particular, we should like to know whether there is any legal document stating whether or not Jefferson Square must be used only for park purposes."

OPINION

The land which is now Jefferson Square Park and Margaret Hayward Playground was originally public land owned by the Pueblo of San Francisco, of which the City and County of San Francisco is the legal successor. Pursuant to the Van Ness Ordinance and Ordinances 522 and 543, certain areas of this public land west of Larkin Street were selected as parks and dedicated to that use. Jefferson Square Park was one of these areas so dedicated.

Therefore, in reply to the last sentence of your letter, there is no formal written restriction on the use of this land.

While there is no documentary formal trust imposed on the use of this real property, by operation of law a trust arises on land dedicated to a public use. This is particularly zealously guarded with reference to land given over to park purposes. A series of earlier cases in this state sets forth strong language in this regard. See:

Beadley v. San Francisco, 50 Cal. 275;

Clark v. San Francisco, 124 U.S. 694;

San Francisco v. Itsell, 80 Cal. 57;

Spires v. Los Angeles, 150 Cal. 59;

Hall v. Fairchild, etc. Co., 66 Cal. App. 615;

Harter v. San Jose, 141 Cal. 569;

My Opinion, January 18, 1927.

Some more recent cases (Slavich v. Hamilton, 201 Cal. 299; Spinks v. Los Angeles, 220 Cal. 306; Hitzmann v. Los Angeles, 34 Cal. App. (2) 470; Reichelderfer v. Quinn, 287 U.S. 315) indicate that the city may have the power to change all or part of the park use to some other inconsistent public purpose if the land has been acquired by the City's own action (as in the case of Jefferson Square) and not by gift or grant by a private donor.

This apparent trend is of no assistance to you, for the Charter § 41 provides:

> "Section 41. The [Park] Commissioners shall have the complete and exclusive control, management, and direction of the parks, squares, avenues, grounds and recreation centers, now or hereafter placed under charge of the commission, including exclusive right to erect and to superintend the erection of buildings and structures thereon, except as in this charter otherwise provided.
>
> "The Commissioners shall not lease any part of the lands under its control nor permit the building or maintenance or use of any structure on any park,

"square, avenue or ground, except for recreation purposes, and each letting or permit shall be subject to the approval of the board of supervisors by ordinance, * * *."

Such a mandate is, of course, binding and would forbid the voluntary transfer of this park area to the Redevelopment Agency by the city.

Without discussing the details of the Community Redevelopment Act (Stats. 1943 Ch. 1326; Stats. 1947 Ch. 1515; Deering General Laws, Act 1500), after action by the Board of Supervisors, a Redevelopment Agency is activated. This is defined (§ 44) as "a public body, corporate and politic" and is granted broad powers to acquire and clear land for the erection of new dwellings in a "project area."

To facilitate the acquisition of land, it is further provided:

"Article 12
Eminent Domain Proceedings

"§ 74. Right of agency. The agency shall have the right to acquire all or any part of the real property within the project area by the exercise of the power of eminent domain in accordance with the provisions of the Code of Civil Procedure and other applicable provisions of law.

"§ 75. Property devoted to public use. Property already devoted to a public use may be acquired by the agency by the exercise of the power of eminent domain, except that no property of a State public body may be acquired without its consent."

Since § 17 defines a state public body as "* * * any city and county * * *", it is apparent that no condemnation proceedings could be instituted without the consent of the city.

If such consent were given, additional questions would arise relating to the employment of an action of eminent domain. Section 74 above quoted indicates that the method set forth in the Code of Civil Procedure shall be followed in the exercise of this power. Section 1240 of that Code

provides that when condemnation proceedings are instituted against lands already dedicated to a public use, the proposed new use must be more necessary than the existing one. Section 75 of the Act permits the acquisition of lands already given over to a public use when consent to do so is obtained. It is not clear whether this is intended to be a limitation on the power of eminent domain granted by the Code of Civil Procedure, or an extension of that power, so that if consent is given as provided, then there is no necessity to show that the proposed use as a project area is more necessary than the existing use. In my opinion the intent of the legislature was to restrict the power of the agency condemning land already devoted to public uses, so that, in addition to showing a more necessary use as required by the Code of Civil Procedure, the further step is demanded that prior consent of the city be obtained.

Related to the foregoing is the question whether land devoted to park purposes is subject to eminent domain. I have discovered no California case on this point. The United States Government was declared to have such power in taking part of a park in Los Angeles in U. S. Patten [illegible] v. U.S. (C.C.A. 9) 61 F. 2d 270. The weight of American authority indicates that parks are subject to condemnation proceedings for other public uses. (See 18 Am. Jur. 750; 18 A.L.R. 1271; 63 A.L.R. 493.)

Based on the assumption that the Act is constitutional, although it has not yet been considered by the courts, I recommend the following steps:

1. Activation of a Redevelopment Agency as provided in Article 7 of the Act.

2. The Agency then to obtain consent of the Park Commissioners and the Board of Supervisors to institute eminent domain proceedings for the acquisition of this land.

3. Thereupon, the Agency to institute such proceedings and obtain a judgment.

A necessary qualification of the foregoing is the following, which can only be finally determined by judicial decision:

a) The validity of the Act.

b) Whether consent to eminent domain proceedings would violate the implied intent of Charter § 24.

c) If condemnation action is instituted after obtaining the required consent,

whether the proposed use is more necessary than the existing park use.

d) If eminent domain may be exercised over land dedicated to park purposes.

Respectfully submitted,

CITY ATTORNEY.

TO: CITY PLANNING COMMISSION
100 Larkin Street
San Francisco 2
Attention: Mr. I. J. Kent, Jr.,
Director of Planning.

November 14, 1947

SUBJECT: COFFEE VENDING MACHINES - HEALTH DEPARTMENT.

Dear Sir:

I have your request for an opinion as follows:

"Recently several circulars have been received in the mail of this department and undoubtedly applications will soon be filed for the following type of food-vending-machine installation:

"A Coffee Bar which dispenses hot coffee automatically for five cents. The five cents is inserted in a slot and a choice of black - no sugar, black with sugar, cream - no sugar, cream and sugar is available by pressing the proper button. This is strictly a self-vending machine.

"Such an installation would be right in line with the wording of our Public Eating Place Ordinance, which mentions that a permit must be maintained where food or drink is dispensed and consumed upon the premises. An annual fee of $18.00 is required.

"In view of your recent ruling on launderettes in which they were placed in the category of vending machine operation, I am asking whether or not this type of vending equipment falls within the requisites of the Public Eating Place Ordinance."

OPINION

Article 8, Section 451 of the Health Code defines a "public eating place" to be:

"A public eating place, as defined in this section, shall mean and include every restaurant, lunch room, tea room, soda fountain, buffet, grill room, lunch counter, dining room, dining room of hotel, coffee shop, club, and every other place where food is sold to be consumed on the premises, and all kitchens, commissaries and other rooms appurtenant thereto or connected therewith."

In the instant matter, it appears from the facts that coffee will be sold to be taken away for consumption, rather than be consumed on the premises.

Section 454 of the same code sets forth the minimum requirements which shall be set up by the Director of Public Health in regulating public eating places. Said section reads as follows:

"Regulations. The rules and regulations to be issued by said Director, shall, among other matters, provide for the following:

(a) Suitable ducts in said kitchens and elimination of obnoxious and disagreeable odors from said public eating places;

(b) Suitable hoods for ranges;

(c) Proper ventilation for kitchens and dining rooms;

(d) Basements and storerooms to be dry, clean and sanitary;

(e) Regulation of refrigeration and storage of foodstuffs;

(f) Installation and maintenance of proper sanitary plumbing;

(g) Handling, storage and dispensing of milk;

(h) Receptacles for soiled linen, use of clean linens and laundering thereof;

(i) Methods and manner of dishwashing;

(j) Collection and disposition of garbage and proper receptacles and containers therefor;

(k) Adequate toilet facilities and the location of water closets, dressing rooms, lockers and wash basins;

(l) Cleanliness of the premises, utensils and towels."

In my opinion a study of these two sections of the Health Code discloses that a coin-in-the-slot coffee vending machine would not come within their purview. The word "food" as used in Section 451 has been legally construed to mean anything which is eaten or drunk for nourishment and therefore coffee would be included. However, it would appear unreasonable and would require a very strained interpretation of Section 454 to apply the minimum

regulations required by that section to the coffee vending machines described in your request.

Undoubtedly the public consumption of coffee and cream, whether in a public eating place or through a coffee vending machine, appears to be a matter of public health concern. Therefore, in the absence of specific legislation perhaps such food-vending machines should be the subject of additional legislation by ordinance through the Board of Supervisors.

Respectfully submitted,

To: CITY ATTORNEY.

J. C. GEIGER, M.D.,
Director of Public Health
VIA CHIEF ADMINISTRATOR T. A. BROOKS.

No 30

November 26, 1947

SUBJECT: USE OF FUHRMAN BEQUEST FOR ADORNMENT OF THE BLEACHERS TO BE ERECTED IN "BIG REC" IN GOLDEN GATE PARK.

Gentlemen:

I have your request for an opinion as follows:

"The Board of Park Commissioners has had plans prepared for the erection of bleachers in "Big Rec", Golden Gate Park, and funds are available for this purpose. However, the Board desires to beautify and further adorn these bleachers and make them acceptable and in keeping with the beauty of the park and meadow in which they are to be erected. This would be over and beyond the usual work necessary to construct.

"The Board desires to use part of the Fuhrman bequest for this further adornment of the park. If it is not possible to use the Fuhrman money for this purpose, the bleachers will have to be constructed in the usual and ordinary manner and, naturally, will be very plain.

"Please advise the Board of Park Commissioners with regard to whether moneys may be taken from the Fuhrman funds for the beautification and adornment of the bleachers."

O P I N I O N

From the contents of your request it is quite apparent that your proposed plans for the beautifying and further adornment of the bleachers to be erected in "Big Rec" are in keeping with both the letter and the spirit of the Fuhrman bequest which reads:

> "All the rest and residue of my estate of every kind and nature I hereby give, bequeath and devise to the City and County of San Francisco, a municipal corporation, to be used and expended in the following proportions and for the following purposes, to wit:
>
> "One half of said rest and residue to the San Francisco Public Library for the acquisition of additional books on economic and political subjects, and the remaining one-half of said rest and residue

for the further adornment of our famed and beloved Golden Gate Park, as may be determined by the Park Commissioners of said City and County, as it is my intent and Will that the Public at large shall be and become my ultimate beneficiaries."

See also my Opinions dated December 19, 1945 and October 8, 1946.

Therefore, I advise you that if the work on the bleachers is carried out as you have outlined in your request, it will constitute a proper public expenditure of the funds of the Fuhrman bequest.

Respectfully submitted,

CITY ATTORNEY

To: Board of Park Commissioners
BJW

December 1, 1947

SUBJECT: Duty of Recorder to Keep a Newspaper on File.

Dear Sir:

This office is in receipt of request for opinion from you as follows:

"We call your attention to paragraph taken from Chapter 424, Statutes of 1947, which reads as follows:

"27206. The Recorder shall subscribe for at least one and not more than three newspapers printed and published in the county as the Board of Supervisors selects and determines.

"27207. The Recorder shall receive and preserve all copies of the papers subscribed for and from time to time cause them to be properly arranged and bound in volumes of convenient size and substantial manner. When bound the volumes shall be kept in his office for the use of the courts when needed, of strangers, and the inhabitants of the county, all of whom shall have access thereto at all times during office hours free of charge. For neglect of this duty, the Recorder shall forfeit Fifty Dollars ($50.00) to be recovered with costs in a civil action before any court. One-half of the penalty shall be paid into the county school fund, and the other half to the person who prosecutes the case to successful termination.

"27208. The subscription price for the papers and the cost of binding the several volumes shall be paid out of the general fund of the county, in the same manner as other charges are audited and allowed by the Board of Supervisors. In any county in which the Recorder is compensated by a salary, the expense of procuring and filing the newspapers shall be paid as stationery and book expense for the office of the Recorder is paid.

"27209. Any person who wilfully abstracts, destroys, mutilates, or defaces any number or volume of newspapers purchased pursuant to this article is guilty of a misdemeanor. One-half of any fine that may be imposed shall be paid into the school fund of the county in which the offender is convicted and the other half to the person who makes the complaint.

"This law by virtue of this chapter places these particular sections in the Government Code and apparently repeals the original statute which is found on page 141,

Chapter 60, Statutes of 1862. In view of the provisions of this law as the section now reads, would the Recorder's office be in compliance with the law by filing and binding in accordance with the provisions thereof the newspaper known as "The Recorder" instead of one of the four metropolitan daily papers. Our reason for asking this questions is that the daily newspapers are kept and bound for the convenience of the public in the Public Library, and inasmuch as the original statute makes these records available to the courts, it appears to me that "The Recorder", carrying the daily court calendars as well as considerable legal advertising, would be the logical paper to keep for this purpose."

OPINION

Sections 27206-9 inclusive now incorporated in the Government Code did not repeal the original statute which is found on page 141, chapter 60, Statutes of 1862. The Legislature merely codified this statute into the Government Code. A review of the statute will indicate that there is no change in the intent of the statute. However, in the codification, the language was somewhat simplified and condensed.

Section 27206 of the Government Code provides that the Recorder shall subscribe to at least one and not more than three newspapers printed and published as selected by the Board of Supervisors.

In view of the fact that the newspaper known as "The Recorder" is printed and published in the City and County of San Francisco, there would be no legal objection to the City and County Recorder subscribing and preserving copies of this particular newspaper. However, before the City and County Recorder may do so, the statute requires that the Board of Supervisors select and determine that "The Recorder" shall be the newspaper to be preserved.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney

To: Mr. Thos. A. Toomey, Recorder

RJB

903-2

December 1, 1947

SUBJECT: Application of San Francisco Purchase and Use Tax to purchase, use or other consumption of intoxicating liquor.

Dear Sir:

I have your request for an opinion as follows:

"Attached is a communication to the Purchase and Use Tax Review Board from the California Federated Institute, a tavern owners' association.

"Will you please advise this review board as to whether bar sales involving use of ingredients other than alcoholic liquors are taxable under the San Francisco Purchase and Use Tax."

In a subsequent discussion I have been informed that you desire an opinion as to whether the purchase and use tax applies to the purchase and use of alcoholic liquor generally, and if the answer to this question is in the negative, whether the tax applies to bar sales involving the use of ingredients other than alcoholic liquors.

O P I N I O N

In addition to adopting the exemptions specified in the Revenue & Taxation Code for the State Sales and Use Tax, Section 18 of our ordinance lists ten specific exemptions. None of these pertains to alcoholic beverages. There being no specific exemption of alcoholic beverages from the application of the tax, the question arises as to whether this type of tangible personal property enjoys any immunity under Section 65 of the ordinance which provides as follows:

"This ordinance shall not apply to any person as to whom, or to any purchase or use of property as to which, it is beyond the power of the Board of Supervisors to impose the tax herein provided."

The levy of taxes by a municipality for revenue purposes is a municipal affair within the contemplation of Article XX, Section 6 of the Constitution authorizing cities, by amending their charters to make and enforce regulations concerning municipal affairs. The power of this City and County to raise money by taxation for municipal purposes therefore does not find its source in any grant by the Legislature but directly by the people of the state through the constitutional provision

subject only to the limitations and restrictions appearing in the Constitution and the Charter (West Coast Advertising Co. v. City and County of San Francisco, 14 Cal. 2d 316, 93 Pac. 2d 13[illegible]).

Prior to 1932 the political subdivisions of the State had the power to license and tax the intoxicating liquor business for the purpose of revenue (L.A. Brewing Co. v. Los Angeles, 8 Cal. App. 2d 379). In 1932 Section 22 of Article XX was added to the Constitution which provided that when it became lawful to manufacture and sell intoxicating liquor the State of California should have "the exclusive right and power to control, license and regulate the manufacture, sale, purchase, possession and transportation and disposition of intoxicating liquor within the State." In 1934 the existing Section 22 was adopted which provides that "The State of California..... shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the state." The following provision was added, which was not contained in the 1932 amendment:

> "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or good morals."

I have been unable to locate any decision of our Supreme Court which has considered the effect of Section 22 on the plenary powers of taxation enjoyed by those political subdivisions taking advantage of Section 6 of Article XI of the Constitution, but the matter has been considered by the Appellate Courts. The case of L. A. Brewing Co. v. Los Angeles, 8 Cal. App. 2d 311, held that Section 22 of Article XX changed the power to impose a license tax for revenue upon those engaged in the liquor business from a municipal affair to one of general state-wide concern, and that the section took away from the political subdivisions of the state the power to impose a license tax for the purpose of revenue upon any such business. The language of the decision was no broader than the proposition just stated.

In the case of Treco Distilleries v. County of Los Angeles, 48 Cal. App. 2d [illegible], decided in 1941, it was held that the L. A. Brewing Co. case should not be construed as extending the rule so as to exempt intoxicating liquors from personal property taxation levied against the owner thereof. According

to the headnote of the case, it stands for the following proposition:

> "Constitution, Act XX, reserving to the state the exclusive power "to license and regulate the manufacture, sale, purchase, possession and transportation" of intoxicating liquors within the state, does not include the power to tax; and it does not exempt the owner of liquors from paying a personal property tax thereon levied by local tax agencies, such as a city, school district, and water district."

The Court points out a distinction between the power to tax and the power to regulate, and in support of its distinction it cites the United States Supreme Court Decisions of Clark v. Paul Gray Inc., 306 U.S. 583, and Higgins v. City of St. Louis, 107 U.S. 365, which were based on the famous early case of Gibbons v. Ogden, 6 L. Ed. 23, which held that the clause of the United States Constitution conferring on Congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to Congress to regulate commerce. Also see: Bardon v. Nudelman, 15 N.E. 2d 638 (Illinois 1938) and City of Coos Bay v. Aerie No. 338, 170 Pac. 2d 389 (Oregon 1946).

The L. A. Brewing case and the Three G's case are not in conflict and both decisions appear to be sound. It is reasonable to conclude that when the exclusive power was given to the State to license and regulate, it was granted as a measure of the police power and when the provision was added providing that the State Board of Equalization shall have the exclusive power to collect license fees and occupation taxes in connection with the manufacture, importation and sale of intoxicating liquors, it was intended as the measure and extent of such power to be exercised exclusively by the State Board of Equalization on the subject. This conclusion would follow from the general rule of statutory and constitutional interpretation "expressio unius est exclusio alterius," the express mention of one thing implies the exclusion of another, and the rule set forth in the case of Bartello v. Superior Court, 202 Cal. 490, that in the grants of powers and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant, and that it is to be exercised in the prescribed mode. In my opinion this construction is particularly warranted in the

present case when it is realized that the grant of exclusive power to the state is in derogation per tanto of the existing plenary powers of taxation possessed by the cities under Article XI, Section 6, with relation to municipal affairs.

Adopting the principle then that the exclusive power reserved to the State by Section 22 with respect to taxation is limited to the collection of license fees and occupation taxes, the next consideration is as to whether our purchase and use tax comes within either of these categories.

The title of the purchase and use tax ordinance, No. 4527, reads as follows:

> "Imposing Excise Tax on the Retail Purchase, Use or Other Consumption of Tangible Personal Property, Providing for the Registration of Retailers, for the Levy and Collection of Such Tax and Prescribing Penalties for the Violation of the Provisions Thereof."

Section 13 of the Ordinance provides as follows:

> "An excise tax at the rate of ½ of one per cent of the purchase price thereof is hereby imposed on the purchase by any person of tangible personal property from any retailer in the City and County of San Francisco, and on the use or other consumption of tangible personal property in said City and County purchased from any retailer for use or other consumption therein."

The tax thus imposed is neither a license fee or an occupation tax. By its terms it is an excise tax on the purchase, the transaction, and the use or other consumption of tangible personal property. The tax is imposed directly on the purchaser. The seller is made the agent for the City in the collection of the tax, and as an incident of such agency is required to register and secure a certificate of authority to collect the tax. No business or occupation is licensed or taxed.

The type of tax imposed by the San Francisco Ordinance has been in effect in cities in other states where the purchaser is required to pay the tax and the seller is the agent for collection and its nature and effect has received judicial interpretation from the Supreme Courts of these jurisdictions.

In the case of Benledeaux v. Maestri, 2 So. 2d 11, the Supreme Court of Louisiana held that the tax levied by the City of New Orleans, which was designated as a sales or use tax, was an excise tax rather than a license tax within a constitutional provision permitting license taxes to be levied on such classes of persons as the Legislature may deem proper and prohibiting any political subdivision from imposing a greater license tax than is imposed for state purposes. The court pointed out "the sales tax is levied upon the transaction, and paid by the purchaser, user or consumer. The license tax is paid by the party granted the privilege of pursuing a business, trade, vocation, calling, occupation or profession. The dealer under the "sales or use tax is not taxed but is the agent of the taxing authority for collecting and remitting the tax. The buyer's, the dealer's, the user's and the consumer's occupations are not taxed. It is not a pursuit or occupation to buy at retail tangible personal property for use or consumption."

In the case of Blauners' Inc. v. City of Philadelphia, 198 Atl. [illegible], it was held that a retail sales tax ordinance enacted by the City of Philadelphia was not invalid as applied to various corporations as a duplication of the mercantile license tax imposed by the commonwealth, since the "mercantile license tax" is an excise on the privilege of doing business; whereas the "sales tax" is a tax paid by the purchaser on transactions.

In the case of In Re A. J. McCallum, 36 Fed. Supp. 432, it was held that a claim of the City of New York against a bankrupt corporate vendor's estate for sales tax was not entitled to priority under the Bankruptcy Act, as such tax is on the purchaser, not vendor, which is obligated only to collect the tax and pay it over to the City, thus making the city's claim therefor a "debt" not a "tax."

It seems clear then, on the authority of the foregoing decisions and on the basis of the wording of the Ordinance itself, that the purchase and use tax levied by this City and County is not a license or occupation tax within the contemplation of Section 22 of Article XI.

You are therefore advised that it is my opinion that the tax levied by Ordinance No. 4337, as amended, is applicable

to the retail purchase, use or other consumption in this city of intoxicating liquor.

Respectfully submitted,

JOHN S. O'[illegible]

CITY ATTORNEY.

To: T. A. BROOKS,
Chief Administrative Officer,
City and County of San Francisco.

December 1, 1947

SUBJECT: Legality of Amendment to Salary Ordinance, Providing for Demand Standby Service and Compensation

Gentlemen:

You have submitted a draft of proposed amendment to the annual salary ordinance to provide for a type of service by occupants of certain positions in utility departments, to be known as Demand Standby, and for compensation therefor. The service consists of twenty-four hour, seven day week, availability for call to duty outside the hours of the normal work week. The service is to be provided only when necessary for the successful operation of the utility and at the instance of the officer in charge, with the approval of the department head. The service is not now contained within the scope of duties of the employees specified.

You request my opinion as to the legality of this amendment.

OPINION

If the compensation to be provided by the amendment were in the nature of an increase of the rate of wages provided for these employees in the budget and the annual appropriation ordinance, the amendment would be void.

SULLIVAN v. MCKINLEY,
14 Cal. (2d) 113,
CHARTER, Sections 71, 151.

This does not appear to be the case, however. These positions as set up at the time of the adoption of the budget and the appropriation and salary ordinances, do not include in their scope of duties the type of service described in this amendment. This service is not a service included among those in the stated list of duties to be performed for the compensation thus provided, nor are these positions among the executive and administrative positions listed in the salary ordinance as exceptions to the normal work week.

It may be urged that there are large numbers of instances in the city service, other than those listed in the amendment and also in other branches of government than the department of utilities, where availability for call to duty is necessary, and that the ordinance is therefore discriminatory and for that reason void. As a matter of policy, to pay the occupants of two positions for standing by and to expect a hundred others to be available voluntarily for the sake of the service or of an occasional opportunity to render overtime service may be highly discriminatory and prejudicial, if in fact such is the case. However this may be, it is a voluntary matter which, while it may become a legislative

and fiscal problem, does not bear legally on the problem presented here because of its voluntary nature.

The amendment proposed is in the nature of an administrative provision, authorized by Section 4 of the salary standardization ordinance, to be enacted in the annual salary ordinance. I have drafted the ordinance submitted by you in somewhat different form and advise you that it is legal to enact the ordinance in this form, also that it may be done by amendment of the salary ordinance, but that the compensation provided in the ordinance may be paid only if funds have been budgeted and appropriated and are available for that purpose.

Respectfully submitted,

CITY ATTORNEY

Board of Supervisors

WP

December 2, 1947

SUBJECT: AGRICULTURAL COMMISSIONER, RIGHT OF, TO RECEIVE INCREASE IN PAY FROM FUNDS FURNISHED BY THE STATE OF CALIFORNIA PRIOR TO BEGINNING OF FISCAL YEAR.

Dear Sir:

I have your request for an opinion as follows:

"Mr. W. F. Carroll, County Agricultural Commissioner, has forwarded to us a copy of Senate Bill 380, which has now become Chapter 1519 of the Statutes of 1947, under which the Director of the State Department of Agriculture may enter into an agreement with the Board of Supervisors to increase the salary of the County Agricultural Commissioner above his present salary as provided in the salary ordinance, and to reimburse the City and County of San Francisco in the amount of such increase in compensation.

"We are requested by the County Agricultural Commissioner to send to the Board of Supervisors an amendment to the salary ordinance to make possible the payment of this additional compensation to the County Agricultural Commissioner.

"In view of the provisions of Sections 71, 73, and 150 and 151 of the charter of the City and County of San Francisco, we are unable to agree that the salary of the County Agricultural Commissioner may be increased except as provided in charter provisions, even though the city and county may be reimbursed by the State of California in the amount of such increase.

"The salary fixed in the salary standardization ordinance for this position, pursuant to the provisions of section 151 of the charter is $385 per month entrance to $460 maximum. The County Agricultural Commissioner now receives the maximum salary of $460 per month.

"Will you kindly advise us if there is any authority in the charter under which the salary of this employee may be increased as requested by him and as provided in the new State Statute.

"**********."

O P I N I O N

I have carefully considered the various sections of the Charter referred to in your request and, while I do not deem it necessary to quote them here, I specifically point out that Sections 71, 73, 150 and 151, together with other sections which I will refer to later, have been carefully considered by me and I am of the opinion that they contain no authority under which it would be possible to grant the increase in pay sought by the County Agricultural Commissioner under the provisions of Chapter 1519, Statutes of 1947.

A short history of the creation of this county office will clearly show the basis for my conclusion.

At the time that the Charter was adopted and became effective, January 8, 1932, neither the state law nor the charter made any provision

for a County Agricultural Commissioner. Section 2322, Political Code, provided that each county should have a County Horticultural Commissioner. The former San Francisco Charter provided for a County Horticultural Commissioner and the present Charter provides in Section 4 that "a horticultural commissioner" shall be a county officer.

In 1933, the present Agricultural Code was adopted and, under the provisions of Section 51 thereof, there was created the position of County Agricultural Commissioner. The effect of the adoption of the Agricultural Code, insofar as Section 2322 of the Political Code is concerned, was to repeal this section. The Board of Supervisors, following the authority vested in them by Section 4 of the Charter, which reads, "The officers of the city and county shall be ... and such other officers as may hereafter be provided by law or so designated by ordinance.", passed an ordinance designating the County Horticultural Commissioner as the County Agricultural Commissioner.

The City and County of San Francisco adopted Section 62 in said Charter pursuant to Section 8½ of Article XI of the State Constitution, which provides in part that a chartered city may provide in its charter amongst other things the manner in which the various county and municipal officers may be chosen. This section as it originally stood read as follows:

> "Other positions as heads of departments, bureaus, offices or institutions which have heretofore been exempt from charter civil service provisions, are hereby declared to be subject to the civil service provisions of this charter unless specifically exempted, and any incumbent in any such position at the time this charter shall be ratified by the State Legislature shall, if he has held office for one year continuously prior thereto, be deemed appointed to such position under the civil service provisions of this charter and thereafter shall hold office under such provisions."

Section 62 was amended in 1945 but for the purposes of this opinion the amendment is immaterial.

Mr. Carroll, the present County Agricultural Commissioner, was not the incumbent in this position on January 8, 1932, but was appointed to the position on August 22, 1932, at which time the position could only be filled by a Civil Service appointment pursuant to the provisions of Section 62. Consequently, ever since the adoption of the present charter in 1932 this position has been subject to all of the Civil Service provisions of the Charter.

With this sketchy review of the history of the office of County Agricultural Commissioner, it is quite clear that it is now subject to the Civil Service provisions of the Charter. Section 151 of the Charter, dealing with standardization of compensation, recites:

> "Section 151. The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, as in this section provided, all salaries, wages and compensations of every kind and nature, except pension or retirement allowances, for the positions, or places of employment, of all officers and employees of all departments,

offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county."

Section 71 provides in part:

"...salary and wage rates for classes of employees subject to salary standardization as in this Charter provided shall be vested in the manner provided in this Charter.",

and further provides:

"All increases in salaries or wages of officers and employees shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances, and no such increase shall be effective prior to the fiscal year for which the budget is adopted."

The conclusion is inescapable, as stated at the beginning of my pinion, that the Agricultural Commissioner may not at this time secure ny increase in his salary, even though the funds are made available y the State.

Nothing in this opinion should be construed as preventing the ivil Service Commission and the Chief Administrative Officer from taking uch steps as are legally necessary under the Charter to effect some ncrease in the salary of the County Agricultural Commissioner based upon salary survey of other counties, bearing in mind the statute under onsideration, and the necessity of executing agreements similar to the ne attached to your request covering subsequent fiscal years.

Respectfully submitted,

CITY ATTORNEY

o: Civil Service Commission

c: Chief Administrative Officer
Board of Supervisors - President
County Agricultural Commissioner,
W. F. Carroll

December 3, 1947

SUBJECT: PRINTING OF ARGUMENTS ON MEASURES TO BE VOTED UPON PURSUANT TO SECTION 183 OF THE CHARTER.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"The assembling of material to be mailed to voters and placing the assembled material in envelopes is an expensive operation for the Registrar of Voters because it requires so much personnel labor. Would you please advise me if it would be possible legally to reduce this expense in the following manner:

"Require parties submitting arguments to the voters to deliver the copy of such argument to the Registrar of Voters for printing in a pamphlet to be mailed to each voter, instead of permitting such parties to submit individually printed arguments.

"The requirement in this connection is contained in the final paragraph of Sec. 183 of the Charter. It is our thought that perhaps the manner of handling arguments outlined above, which would be similar to the manner in which the State handles "pro" and "con" arguments, would be in substantial compliance with the Charter. A charter amendment has been recommended in this connection, but pending action on it, we would like to institute the more economical method of handling the problem."

O P I N I O N

The pertinent portion of Section 183 of the Charter reads as follows:

> "If the proposition be submitted to the registered voters upon an initiative, referendum or recall petition, the persons filing said petition shall have the right to present to the registrar at any time twenty-five days prior to said election, copies of printed arguments favoring their petition, and the registrar shall not accept arguments favoring said petition without the approval of those filing said petition. If said proposition be submitted by the mayor or by the board of supervisors, or by one-

third of the board of supervisors, they shall have a similar right to present copies of printed arguments. Said arguments, for or against, shall be printed and shall not exceed four pages, six by nine inches in size, for each proposition. Any person, committee or organization opposing the measure, policy, charter amendment, or recall placed before the voters may present, in like manner and of the same form and size and within the same time, printed arguments opposing said proposition. Copies of said arguments shall be delivered to the registrar equal in number to five per cent in excess of the total number of registered voters. The registrar shall cause one copy of each of said arguments to be mailed with the copy of the measure or the amendment." (Emphasis added)

Section 183 of the Charter, quoted above, clearly requires that the copies of the printed arguments be prepared by the person, committee or organization submitting the argument and that a specified number of such copies be delivered to the registrar of voters who must then cause one copy of each argument to be mailed with the copy of the measure or amendment.

The provisions of the state law covering matters submitted by the state legislature to the voters of the state differ from Section 183 of the Charter. They specifically require that the copy of the argument be submitted to the Secretary of State and that the Secretary of State then cause pamphlets which contain a copy of the arguments to be printed and distributed to the voters. (Sections 1500-1516, Elections Code)

I am therefore of the opinion that under Section 183 of the Charter, which applies in this case, the printed arguments must be prepared by the person, committee, or organization submitting said arguments, and that the requisite number of printed copies must be delivered by the person, committee or organization submitting such arguments to the registrar of voters who must then mail a copy of each argument together with the copy of the measure or amendment. The method which you propose in your request would not be in compliance with Section 183 of the Charter.

Respectfully submitted,

CITY ATTORNEY

To:Chief Administrative Officer
LSW

December 3, 1947

SUBJECT: Acceptance by Superior Court Bailiff and Clerk of Appointments as Appraiser, Referee or Receiver in Proceedings, in Relation to Rule 36 of the Civil Service Commission, entitled "Holding more than one Salaried Position."

Gentlemen:

You have made request for an opinion as follows:

REQUEST

"The commission is advised that on numerous occasions Bailiffs assigned to such duty by the Sheriff have been appointed by Judges as appraisers, for which services the Bailiffs are paid fees and that on other occasions Court Room Clerks assigned to such duty by the County Clerk have been appointed by Judges as referees or receivers for which services the Clerks are paid fees. These fees, we are informed, are from sources other than City and County funds and are in addition to their regular salaries paid by the City and County. Bailiffs and Court Room Clerks hold their respective positions under Civil Service appointment and occupy full times positions in the City and County service.

"We call your attention to Rule 36 of the Civil Service Commission, copy of which you have. The commission desires your opinion as to whether under the provisions of Rule 36, Bailiffs and Court Room Clerks are required to obtain prior permission of the Civil Service Commission to undertake work as appraisers, referees and receivers under court appointment."

OPINION

Rule 36 of the Civil Service Commission is as follows:

"HOLDING OF MORE THAN ONE SALARIED POSITION

"No person holding a full time position under civil service appointment shall be allowed to hold any other paid position in the City and County government or in the San Francisco Unified School District, or in any other governmental jurisdiction, or in private employment, when such other position may have the effect of reducing the efficiency of such employee in his

civil service position.

"Any employee holding a position under civil service appointment, who also holds any other paid position, shall inform the Civil Service Commission of the nature of such other employment.

"Employees of the municipal service who desire to accept part time employment in addition to their regular civil service positions, in other classifications, or in other city departments, or in private industry, must first secure approval from the Civil Service Commission. Requests for approval to accept part time employment must be on forms provided by the Civil Service Commission. The request for such approval must state the nature of the proposed employment, the hours to be worked per week, and the proposed place of part time employment: it must be approved by the officer having appointive power over the employee's regular full time position and it must have a statement from the part time employer that he knows the employee is regularly employed on a full time basis in the city service and that he is employing him subject to compliance with the rules of the Civil Service Commission concerning the holding of more than one salaried position.

"Persons accepting part time employment may not be employed over 24 hours per week in addition to their regular work week.

"The Civil Service Commission, on the basis of investigation and report by the Secretary and Personnel Director, shall decide whether the holding of two positions affects the efficiency of the employee in his civil service position, or in any respect in the judgment of the Commission, may be inadvisable or contrary to the best interests of the city service. If it is the decision of the Civil Service Commission that the efficiency of the employee in his civil service position or the best interests of the city service is or may be affected by the holding of any other position, then such employee shall resign from such other position within thirty days after order by the Civil Service Commission. If, after such decision by the Civil Service Commission, the employee refuses to resign from his other employment, then such refusal shall be deemed to be 'insubordination' and such employee shall be removed in accordance with procedures as stated in Section 154 of the Charter."

The subject of Rule 36 is "Holding of more than one salaried position." It deals with "positions," whether of full time or of part time employment. It prohibits the acceptance by a full time civil service employee of any other "paid position" which will reduce his

efficiency in his civil service position.

The section requests a report of the proposed hours and place of employment in any part time position and prohibits such employment for over twenty-four hours per week.

The section is prohibitory and regulatory in nature and under the law its meaning is not to be extended beyond that which it clearly bears.

The first question therefore is whether an appointment of a person by a judge of the Superior Court, to act as appraiser, referee or receiver in an individual case, probate of an estate, guardianship or special proceeding is an appointment to a position within the meaning of Rule 36. Does an appraiser, referee or receiver in a case occupy a position within the meaning of this rule?

Section 142 of the Charter uses the word "positions" in providing for the classified civil service, and it is proper to assume that this rule of the Civil Service Commission relating to the classified civil service uses the word in the same general sense.

The word "position" as used in Section 142 was discussed by the Supreme Court in the recent case of KENNEDY v. ROSS, 28 Cal. (2d) 569, 572, as follows:

> "The contract calls for his expert professional services on other than a permanent basis, but it does not follow that he is thereby employed in a position in any department of the city. The fact is otherwise. No position, temporary or permanent, in any department, was thereby created as contemplated by section 143 of the charter. The petitioner was engaged to do a specific expert professional task for a stated consideration. 'Positions' in 'departments and offices' of the city connote an employment to render services at a salary paid periodically and are governed by the salary standardization and related portions of the charter also invoked by the respondent."

The word "position" as thus used does not include all forms of service. It is frequently used synonymously with the word "employment", and in opposition to the word "office."

Appraisers, referees and receivers appointed by the court are special officers of the court for judicial purposes in the proceedings in which they are designated by court order.

Appraisers, "being appointed for the performance of a judicial duty, are ipso facto officers of the court for that purpose; therefore, their character, capacity and duties are official, and in the execution of their office they are bound to the performance of an official duty." 11A CAL. JUR. 476, PROBATE CODE, Sec. 605.

A receiver "is an officer or representative of the court, appointed on behalf of all the parties who may establish rights in the cause." 22 CAL. JUR. 428; CODE OF CIVIL PROCEDURE, Sec. 564.

A referee is "an officer appointed by the court, having all the powers that the statute authorizes to be delegated to him." 22 CAL. JUR. 690; CODE OF CIVIL PROCEDURE, Sec. 641.

The limited court duty of appraiser, referee or receiver in a case may be likened to that of executor, administrator or juror.

No further statement is necessary to answer your exact question, but the situation you present is broader than the question you ask. A few additional comments are therefore required.

The Superior Court is a state court, exercising state functions. Its clerks and bailiffs, while serving in it, are ministerial officers of the court. The courts of the state are given power over their ministerial officers by state statute, CODE OF CIVIL PROCEDURE, Section 128, as follows:

> "Every court shall have power:
>
> 5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto."

This provision was stated by Judge Kerrigan, in RISON v. POSTAL-TELEGRAPH CABLE CO., 28 Fed. (2d) 788, to be "a codification of a general common-law rule."

So far as the conduct of the court is concerned, its judicial proceedings and every matter pertaining thereto, the authority of the court over the clerk and bailiff serving in it is exclusive.

I regard this to be true in spite of the fact that, by Article XI, Section 8½, of the Constitution, the City and County is authorized by its Charter to provide generally for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies and clerks. This conclusion is in accord with established law and is necessary to the conduct of the judicial branch of the state government. The privilege given by the constitutional section is only for the purpose of facilitating the mechanism of local government and is not for the purpose of giving it any authority in the operation of the courts or other branches of the state government.

In NICHOLL v. KOSTER, 157 Cal. 416, 421, it is pointed out

that the matter of duties of county officers is a state affair and not a matter to be fixed by charter. The opinion states as follows:

> "But section 5 of article XI confers upon the legislature plenary power to prescribe the duties of sheriffs and other county officers. Section 8½ does not say that the duties of the county officers may be fixed by the charter of a consolidated city and county. That power still remains with the legislature."

Amendments of both the sections of the Constitution referred to above have not changed the substance of the provisions in this regard.

It appears proper to note also that appraisers, receivers and referees are generally appointed by the court on account of its confidence in their integrity, accuracy and fairness rather than because of the physical work entailed. The court may frequently desire also to keep more closely in touch with matters so referred, and may find that it is able to do so in certain cases by the appointment of its bailiff or clerk. It is presumed that the court would be the first to object, if the performance of these functions in any way interfered with the duties of bailiff or clerk. As a practical proposition, there is virtually no interference in any case where a bailiff or clerk is appointed.

In your request for opinion, you refer to the payment of fees to the clerk and bailiff when appointed receiver, referee or appraiser. These appointments in court proceedings do not create salaried offices of the state government, and the appointees are not subject to the provision of the last paragraph of Section 142 of the Charter prohibiting salaried officers of the City and County from holding other governmental salaried offices. See: THOMPSON v. WOOD, 115 Cal. 301; SPANGENBERG v. SPANGENBERG, 123 Cal. App. 387.

Section 150 of the Charter, requiring payment into the treasury of fees of an office or employment which are received by an officer or employee paid by virtue of Charter provision, is likewise not in point. Fees ordered paid an appraiser, referee or receiver are not fees of the office or employment of clerk or bailiff, nor are they received in the course of such office or employment. This provision refers to fees received by virtue of the office or employment held under the City and County and not to fees received for separate service by virtue of a court order.

My conclusion, therefore, is that Rule 36 does not relate to appointments by the court as appraiser, referee or receiver, that the Superior Court has exclusive control of its ministerial officers in all matters relating to the Court and that the matter of fees

ordered paid for service in such appointments is not a concern of the City and County.

Respectfully submitted,

CITY ATTORNEY

Civil Service Commission

WP

December 3, 1947

SUBJECT: WAR--TERMINATION OF WITH RESPECT TO GOVERNMENT CONTROLS OVER BUILDING.

Gentlemen:

Reference is made to your letter of November 24, 1947, reading as follows:

"Just prior to the outbreak of the war, the Board of Supervisors closed a street at the request of a local business firm (Safeway Stores). The board stipulated as a condition to the closure that the firm must construct a building on the abandoned portion of the street within one year. (Resolution No. 2285, Series of 1939)

"When war controls were imposed on building, the board gave the firm 'until one year after the present war' to comply with the above requirement. (Resolution No. 2957, Series of 1939)

"The firm is now anxious to learn the date prior to which it must erect the building in order to prevent reversion of the abandoned portion of the street to the city.

"Will you kindly let me have your views on this matter at your early convenience? If the one year period runs from President Truman's declaration of the cessation of hostilities on December 31, 1946, then obviously the firm must commence construction immediately."

O P I N I O N

Resolution No. 2957 (Series of 1939), adopted October 26, 1942, reads:

"WHEREAS, on December 8, 1941, this Board adopted Resolution No. 2285, Series of 1939, closing and abandoning that portion of Wisconsin Street, between Mariposa Street and 18th Street, San Francisco, subject to the condition that in the event the abutting property owner, Safeway Stores, Inc., did not construct buildings on said portion of Wisconsin Street within one year after the closing thereof, then title thereto would revert to the City and County of San Francisco, a municipal corporation; and

"WHEREAS, due to war conditions, Safeway Stores, Inc., has been unable to obtain priorities for building construction on said land; and

"WHEREAS, by letter dated September 28, 1942, Safeway Stores, Inc., requested this Board to either waive entirely the aforementioned condition, or grant an extension of time until one year after the present war.

"NOW, THEREFORE, BE IT RESOLVED, in accordance with the recommendation of the Director of Property that Safeway Stores, Inc., a corporation, be and is hereby granted an extension of time until one year after the present war to construct buildings on said closed portion of Wisconsin Street."

There can be little doubt that what the Board of Supervisors had in mind was that after the war, government controls on private building would be lifted, and that one year from such date would give ample time for erection of the buildings. A statute must be construed with reference to the object to be accomplished by it, and in ascertaining such object it is proper to consider the necessity for its enactment. (Johnston v. Baker, 167 Cal. 260, 264) The spirit, purpose and intention of the law must be considered. (Grannis v. Superior Court, 146 Cal. 245, 247)

In its technical sense "a state of war still exists between the United States and the former so-called Axis countries, and it cannot be argued with any degree of cogency that their unconditional surrender can be said to have changed the presently existing official status of this government in relation to them. We are still officially at war and the period of war has been held to extend to the ratification of the Treaty of Peace or the Proclamation of Peace. Hijo v. United States, 194 U.S. 315, 323, 24 S.Ct. 727, 48 L.Ed. 994; United States v. Anderson, 9 Wall. 56 70, 19 L.Ed. 615." (Citizens Protective League v. Byrnes, 64 F. Supp. 233, 234-5; Citizens Protective League v. Clark, 155 F. (2) 290, 295; Dooley v. Johnson, 133 Cal. App. 459)

But in its ordinary and popular sense war ends when hostilities cease. (Kaiser v. Hopkins, 6 Cal. (2) 537; Lincoln v. Harvey [Tex. Civ. App.], 191 S.W. (2) 764, 765)

In statutes, where a word has a popular and also a technical meaning, the courts will accord to it its popular meaning, unless the very nature of the subject indicates or the context suggests

that it is employed in its technical sense. (City of Pasadena v. Railroad Commission, 183 Cal. 526, 532) Therefore, Safeway would definitely not have until one year after a peace treaty is ratified in which to build.

In a popular sense hostilities ceased on V-J Day, August 14, 1945. However, it was not until December 31, 1946, that President Truman proclaimed "the cessation of hostilities in World War II" (12 Fed. Register 1; U.S. Code Cong. Service, 1946, p. 1750), and it was not until June 30, 1947, that Veterans' Housing Program Order No. 1 was revoked. This order was made pursuant to authority granted in the Veterans' Emergency Housing Act of 1946, and its effect was to prevent most types of industrial construction without a permit from the Civilian Production Administration, and later the Housing Expediter. This permit as a rule was withheld in the interests of expediting housing for veterans. The Housing and Rent Act of 1947 repealed as of July 1, 1947, most of the provisions of the Veterans' Emergency Housing Act of 1946, including those provisions under which Veterans' Housing Program Order No. 1 was issued, and accordingly this order was revoked as of June 30, 1947.

Under the Housing and Rent Act of 1947 which became effective July 1, 1947, the Housing Expediter can only regulate by permit construction "for amusement or recreational purposes" and hence, as of that date, government controls over building were lifted except as noted.

In the light of the circumstances of this case, and particularly because the extension of time contained in Resolution No. 2957 (Series of 1939) was granted because "due to war conditions, Safeway Stores, Inc., has been unable to obtain priorities for building construction on said land," and in view of the fact that not until June 30, 1947, were controls on private building lifted, it is a fair conclusion that the language used by the Board of Supervisors, to wit: "until one year after the present war," was intended by the Board to mean "until one year after the lifting of government controls and restrictions on building occasioned by the present war."

It is therefore my view that Safeway Stores has until June 30, 1948, to erect the required buildings.

However, because the question whether the one year period should date from August 14, 1945, or December 31, 1946, or July 1, 1947, is not entirely free from doubt, I would suggest that the Board of Supervisors adopt another resolution specifying the date as of which Safeway must complete the necessary construction.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors
GEB

December 9, 1947

SUBJECT: REFUND OF TAXES ON PROPERTY STORED IN WAREHOUSES FOR CONVENIENCE OF OWNER BUT DESTINED FOR CONSUMPTION OUTSIDE OF UNITED STATES.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Transmitted herewith is the claim of American Tobacco Company for refund of $1,982.51 which it alleges was erroneously or illegally collected as personal property taxes on cigarettes and tobacco stored in a bonded warehouse and designated for export on the assessment date, and which were ultimately delivered to ships as 'sea stores' for consumption outside the United States.

"I understand that though the merchandise was intended for export, it was stored for an indefinite time for the convenience of the owner in filling orders for such merchandise and its ultimate destination was under the control of the owner at the time the taxes were levied. The principal questions consequently appear to be whether or not sea stores are exports and, if so, whether or not the continuity of transit of such goods into foreign commerce was broken by storage and they became subject to local taxes.

"May I please have your opinion as to whether or not the American Tobacco Company is legally entitled to the refund which it claims."

O P I N I O N

Attached to your request are the letter from the American Tobacco Company, the claim for refund and certain other documents and copies of letters. The letter from the American Tobacco Company indicates that individual package tobacco in question were specially stamped to read as follows:

"Sea Stores
for Consumption Outside the U.S.
Penalty for Fraudulent
Relanding or Sale in the U.S."

The letter states in part:

"Since it is illegal to sell or transport such tobacco products without Federal revenue stamps

> except that being sold or transported under Federal regulations for export purposes, since the merchandise in question was predestined for shipment abroad and was transported and temporarily stored in San Francisco in bond under Federal regulations, and since the merchandise was in fact delivered to ships for consumption outside of the United States, it is claimed that the personal property tax does not apply. The cigarettes and smoking tobacco being specially earmarked and not bearing Federal revenue stamps, it is our contention that even though they were in fact temporarily located in San Francisco on tax date they were in effect 'in transit' from factories in the Southern states to points outside the United States. Under no circumstances could this merchandise be diverted to domestic consumption."

The question in the instant case is whether the tobacco upon which a tax was levied by the City and County of San Francisco was to be considered as property in interstate commerce and therefore not subject to local taxation or whether there had been a sufficient break in the continuity of interstate transit to justify the imposition of the tax by the City and County of San Francisco.

The general principles determinative of the question have been summarized by the Supreme Court of the State of California in the case of Von Hamm-Young Co. v. San Francisco, 29 Cal. (2d) 798. At page 802 the court stated:

> "The basic issue with respect to the taxability of the goods that were shipped by rail to San Francisco is whether their storage in San Francisco constituted such a break in their interstate transit as to remove them from the protection of the commerce clause. Neither the fact that the goods had moved in interstate commerce nor the fact that further movement was intended is, alone, a bar to the tax. (Bacon v. Illinois, 227 U.S. 504, 515 /33 S.Ct. 299, 57 L.Ed. 615/.) On the other hand, the fact that the shipper could have diverted the goods from their destination does not remove them from the protection of the commerce clause, if the other facts show that the interstate transit had already begun and the interruption of this transit was only incidental to its continuation. (Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 476 /47 S.Ct. 170, 71 L.Ed. 359/.) The rule governing the break in transit is stated in Minnesota v. Blasius, 290 U.S. 1, 8 /54 S.Ct. 34, 78 L.Ed. 131/, as follows: '. . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax . . . . The 'crucial question' in de-

termining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' Carson Petroleum Co. v. Vial, 279 U.S. 95, 101 [49 S.Ct. 292, 73 L.Ed. 626]. . . . Formalities such as the forms of billing and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance and in any particular case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied.'

"The question therefore is what occasion or purpose will bring the property within the jurisdiction of the local taxing authority. If the break in interstate transit is merely incident to the interstate journey, such as a breakdown in the transportation system (Champlain Realty Co. v. Brattleboro, 260 U.S. 366 [43 S.Ct. 146, 67 L.Ed. 309]), or a delay to promote the safe or convenient transit of the property (Champlain Realty Co. v. Brattleboro, supra; Kelley v. Rhoads, 188 U.S. 1 [23 S.Ct. 259, 47 L.Ed. 359]), to await ships, or to permit accumulation of sufficient cargo to load a ship (Carson Petroleum Co. v. Vial, 279 U.S. 95 [49 S.Ct. 292,73 L.Ed. 626]), the property remains immune from local taxation. A property tax may be imposed on the cargo, however, if the interruption is 'not in necessary delay or accommodation to the means of transportation . . . but for the business purposes and profit of the [taxpayer]' (General Oil Co. v. Crain, 209 U.S. 211, 230-231 [28 S.Ct. 475, 52 L.Ed. 754]; Susquehanna Coal Co. v. South Amboy, 228 U.S. 665, 668 [33 S.Ct. 712, 57 L.Ed. 1015]), such as a halt to process the goods (Bacon v. Illinois, 227 U.S. 504 [33 S.Ct. 299, 57 L.Ed. 615]; Missouri Pacific R. Co. v. Schnipper, 56 F.2d 30), to accumulate a stock of goods to enable the owner to fill orders more readily (Susquehanna Coal Co. v. South Amboy, supra), to separate the goods for distribution to customers, to place the goods in different containers(General Oil Co. v. Crain, supra) or to hold the goods for sale. (Minnesota v. Blasius, 290 U.S. 1 [54 S.Ct. 34, 78 L.Ed. 131]; American Steel & Wire Co. v. Speed, 192 U.S. 500 [24 S.Ct. 365, 48 L.Ed. 538]; Brown v. Houston, 114 U.S. 622 [5 S.Ct. 1091, 29 L.Ed. 257].)"

It appears from your request and the accompanying documents that the tobacco though intended for export was stored for an indefinite time for the convenience of the American Tobacco Company in filling orders for such merchandise. The instant case appears to be similar to that in Susquehanna Coal Co. v. South Amboy, 228

U.S. 655, 57 L.Ed. 1015. In the Susquehanna Coal Co. case, coal was shipped from Pennsylvania by its Pennsylvania owner to its own order at a New Jersey tidewater port, where if no bottoms were available for its continued transportation, it was dumped into a coal depot or storage yard, to be later transferred to bottoms, as occasion required. The intention of the owner was to keep a certain supply of coal on hand to fill anticipated orders. The United States Supreme Court held that under the circumstances there was something more than an incidental interruption of the continuity of the transportation through the state and, therefore, the coal was subject to local taxation while in a depot or storage yard although it was destined ultimately for ports in other states.

See also Independent Warehouses Inc., v. Scheele, 91 L.Ed. (Adv.) 967. The court in the Independent Warehouses case stated at page 974:

> "Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. 'The question is always one of substance, and in each case it is necessary toconsider the particular occasion or purpose of the interruption during which the tax is sought to be levied.' Minnesota v. Blasius, 290 U.S. at 10, 78 L. Ed. 136, 54 S.Ct. 34."

I am therefore of the opinion that in the instant case there was more than an incidental interruption of the continuity of the transportation of the tobacco through the state and that therefore the tobacco in question was subject to local taxation.

You are advised, therefore, that the American Tobacco Company is not legally entitled to the refund as claimed.

Respectfully submitted,

CITY ATTORNEY

To: Controller
LSM

December 9, 1947

SUBJECT: REFUND OF TAXES WHERE INTERSTATE SHIPMENT WAS INTERRUPTED BY THE WAR.

Dear Sir:

I am in receipt of your request for an opinion as follows:

"Attached hereto please find seven claims of the Irving Trust Company of New York for refunds of personal property taxes totaling $518.28 which it claims were erroneously or illegally collected on the ground that thegoods taxes, while en route to Manila, Shanghai and Hongkong, were stored in California because of the war and shipment continued to such points as soon as possible after the war.

"May I please have your opinion as to whether or not the Irving Trust Company is entitled to any of the refunds it claims; and, specifically, whether the goods subsequently shipped to Manila were in interstate commerce or in the process of exportation, and those subsequently shipped to Hongkong and Shanghai in the process of exportation when the taxes were levied, and the effect of such storage."

O P I N I O N

Attached to your request are seven claims for refund for personal property taxes by the Irving Trust Company. These claims are summarized as follows:

Property	En Route To	Shipped On	Pursuant to Bill of Lading dated
1) 28 cases bolts and nuts	Manila	Stm. Golden West	November 13, 1946
2) 3 cases rayon	Manila	Stm. Golden West	December 6, 1945
3) 5 boxes auto parts	Hong Kong	Stm. Trinity Victory	May 5, 1946
4) 18 cases bolts	Manila	Stm. Golden West	December 6, 1945
5) 3 cases auto parts	Shanghai	Stm. Mount Davis	April 26, 1947
6) 18 cases and 19 bales auto parts	Hong Kong	Stm. Iraq Victory	March 23, 1946

7) 6 cases and 1 crate Hong Kong Stm. Trinity Victory May 5, 1946
auto parts

Your attention is directed to my opinion rendered on this date dealing with the claim for refund of the American Tobacco Company wherein the general rules of law regarding the right of the state to tax personal property are set forth.

In the case of Von Hamm-Young Co. v. San Francisco, 29 Cal. (2) 798, the California Supreme Court determined that in the following situations property was immune from local taxation:

1) Where goods had been brought into California and held in storage for shipment to Hawaii where the storage was incidental to the transit of the goods through the state and where the delay, although for an indefinite period, arose entirely from the lack of facilities for immediate transportation.

2) Where goods purchased in California at points other than San Francisco had been delivered to common carriers for shipment to Hawaii and had begun their interstate journey but were diverted to San Francisco warehouses because of the shortage of shipping space.

3) Where goods were purchased in San Francisco and delivered to warehouses because the wartime emergency regulations prohibited immediate delivery to the carriers but were committed to movement out of the state in view of the fact that shipping permits had been obtained.

In the Von Hamm-Young case the delay in shipment was caused by the lack of shipping facilities resulting from the war.

In the case of the instant claims the goods were stored in the San Francisco warehouses pending shipment to Manila, Shanghai and Hong Kong because shipment to these places was impossible during the war. The shipment was completed after the end of the war. The principles of the Von Hamm-Young case would govern in the case of these claims assuming there had been an interstate shipment which was interrupted because of the impossibility of completing the shipment due to war conditions or that the goods if purchased in San Francisco had been committed to movement out of the state.

The claims for refund in the instant case indicate that they were filed with the Board of Supervisors on September 31, 1947. Your attention is directed, however, to Section 5097 of the Revenue and Taxation Code dealing with refunds of taxes which section provides:

> "Conditions. No order for a refund under this article shall be made except on a claim:

"(b) Filed within three years after making of the payment sought to be refunded."

No order for refund may be made therefore where the tax was paid more than three years before the claim was filed.

Respectfully submitted,

CITY ATTORNEY

To: Controller
LSM

December 9, 1947

SUBJECT: Review of Tax Collector's Denial of Permit to Present Theatrical Presentations.

Dear Sirs:

I have your request for an opinion as follows:

REQUEST

"The Board of Permit Appeals, has now under consideration, the question, Marines Memorial Association, relative to its 'Theatre.' They are asking for a license to operate as a theatre. Mr. T. Bryant, Tax Collector, refused a license, due to the fact that Fire Marshal, Frank Kelly, contends that asked for 'Theatre,' does not comply with the existing code definition of 'Theatre.'

"QUESTION - Does this Board abuse its discretion in granting to the 'Marines Memorial Association' a permit for 'Theatrical Performances,' not to exceed 30 performances in any one year?"

OPINION

In deciding this question it must first be determined whether under the new Building Code the premises in question are to be considered a "theatre" or a "public assembly unit." The name used for the premises is not controlling. Is it in fact and in physical construction a theatre or a public assembly unit as defined by the new Code? A more detailed description and a list of the measurements of the premises would have to be furnished before a decision can be reached. It is significant to note, however, that the memoranda and correspondence furnished by the applicant states that the premises are a public assembly unit, but the application requests a permit for the purpose of presenting "theatrical presentations." There are many obvious distinctions between a theatre and a public assembly unit, to be found in articles 11 and 12 of the new Code. A portion of Article 11 defines a theatre as a building designed with a working stage intended to be used for the specific purposes of presenting theatrical or operatic performances.

The mere fact that this organization or its predecessors have in the past put on theatrical performances, whether with or without permission, would not be a controlling factor. If they were not originally lawfully entitled to do so, then that wrong should not be

perpetuated. Moreover, I understand from Chief Kelly that the previous approval given by him in October, 1947, to the applicant to operate as a public assembly unit, was based upon the Chief's mistaken belief that your honorable body had approved the entire building; whereas, in fact, you had approved only a portion of the building, and the theatre is not included in the approved portion. Furthermore, permits, if any, issued to the applicant, or its predecessors, were based upon Section 640 of the old Building Code, which permitted incidental theatrical presentations in a public assembly unit. There is no authority for such a permit in the new Code.

With the foregoing introduction, it is my opinion that you would not abuse your discretion in ordering a permit to be issued to the applicant. Section 1101(b) of the Building Code, to which you are referred, allows for an exercise of discretion in permitting existing theatres to comply with the new Code to the extent necessary to make them safe. It has been held that the Board of Permit Appeals is a fact-finding body; that it may make its own investigation and independent order based thereon - Lindell v. Board of Permit Appeals, 23 Cal. 2d 203; Greif v. Dullea, 66 Cal. App. 2d 988. The cited cases are also authority for the rule that a writ of mandamus may not be employed to compel an administrative agency possessing discretionary power to act in a particular manner, and, further, that unless there has been a clear abuse of the power of discretion, the decision of the agency will not be disturbed by the courts.

In exercising your discretion it is suggested that you keep in mind the purpose of the new Building Code set forth in Sec. 102.

Respectfully submitted,

JOS. J. O'TOOLE

City Attorney.

TO: BOARD OF PERMIT APPEALS
City Hall
San Francisco 2

CHA:DB

December 9, 1947

SUBJECT: Authority of Director of Public Health and Fire Prevention Bureau over a Public Eating Place conducted on a Yacht tied to a Pier.

Dear Sir:

I have your request for an opinion as follows:

REQUEST

"Recently this department has received an application for Public Eating Place Permit for the Yacht Invader. This yacht is a sea-going vessel in charge of a licensed captain, licensed engineer and crew. The boat is under license of the Coast Guard.

"It is to be used as a club - The Invader Yachting and Fishing Club. The membership will be limited and only members and their guests will be served. This is similar to the Bohemian Club, the Union League or any other of the clubs located within the city and county.

"The yacht is provided with the necessary papers of the Coast Guard for a sea-going yacht and is equipped with modern engines and has a steel hull.

"It will not be permanently attached to any pier in San Francisco, as it is to be used several days a week by the members under the direction of the licensed personnel for fishing and yachting purposes. When not engaged in the latter activities, she will be tied up to the pier and members may have dinner aboard and may invite friends.

"What I would like to know is as follows:

"(1) Does this department have authority to request that this organization obtain a Public Eating Place Permit from the Department of Public Health?

"(2) If so, would the Fire Department's regulations have to be complied with or would the approval by the Coast Guard of the fire-fighting equipment and means of egress be sufficient?"

OPINION

A prior opinion of this office dealing with a somewhat similar problem held the provisions of Sections 480 to 486 of the Health Code applicable to a night club to be conducted on a river boat tied to a

pier. The opinion, dated July 7, 1947, was forwarded to you under the title: "Authority of Director of Public Health over Night Club Conducted on River Boat Tied to a Pier." In that opinion it is to be noted that after a consideration of the authorities cited, a conclusion was reached making applicable to the river boat all the laws of the City and County, and all the rules and regulations of the Department of Public Health.

An attempt might be made to distinguish the operations of the Yacht "[illegible]" from the said river boat in that the latter was to be tied permanently to a pier during its night club operations. From the facts stated, the Yacht "[illegible]" is a sea-going vessel and on several days a week it is to be used for the purposes of yachting and fishing; all in navigable waters. It is conceded that the laws of the City and County and the rules and regulations of any of its departments would not be applicable to the Yacht "[illegible]" while plying waters outside the jurisdictional limits of the City and County. However, the application for a Public Eating Place Permit was made to cover the business to be conducted on the yacht while tied to a pier within the jurisdiction of the City and County. It is to this period that we direct our attention.

From the facts stated, it appears that the owners of the Yacht contemplate forming a club known as the "[illegible] & Fishing Club." The members of this club will be entitled not only to enjoy yachting and fishing privileges, but also to board the yacht when tied to a pier, to have meals, and to also partake of alcoholic beverages. The members while enjoying these privileges may also invite friends aboard the yacht.

While the Yacht "[illegible]" is tied to the pier and while such business is being conducted, it is within the jurisdictional limits of the City and County and clearly within the provisions of the definition of a public eating place, as defined in Section 451(a) of the Health Code. Therefore, all of the other provisions of the Health Code dealing with public eating places, namely, sections 451 to 455, inclusive, are applicable. It does not appear that entertainment is to be furnished in addition to the serving of meals and alcoholic beverages. Under such circumstances then, Sections 456-466, inclusive, of the Health Code, do not have to be complied with, and application for a permit to conduct a public eating place on the Yacht "[illegible]" does not first have to be submitted for approval to the Department of Electricity, the Bureau of Building Inspection of the Department of Public Works, and the Bureau of Fire Prevention and Public Safety, as provided in Section 462 of the Health Code dealing with night clubs.

This does not mean, however, that the regulations of the Fire Department do not have to be complied with. In the absence of specific legislation by the State of California, Section 39(a) of the Fire Code permits the Fire Prevention Bureau to conduct an inspection of the yacht to ascertain whether there are proper, safe and adequate means of egress therefrom, and that all other laws and ordinances regarding fire prevention, etc., are enforced. Section 39(a) reads as follows:

> "The members of the Bureau are hereby empowered to enter upon and make inspections of all buildings, structures or premises within the City and County of San Francisco for the purpose of determining if all laws of the State of California and all laws of the City and County of San Francisco have been complied with relative to proper, safe and adequate means of egress therefrom, and all laws and ordinances regarding fire prevention, fire protection and fire spread control are being complied with and the proper precautions are being maintained at all times for the protection of lives and property from fire, and they shall take such action as may be necessary to enforce all laws and ordinances relating to this subject."

Consideration has been given to the fact that numerous other sea-going vessels and liners dock at the piers along San Francisco's waterfront and that they are not made subject to the regulations referred to in this opinion. The distinguishing feature between those ocean-going vessels and the Yacht "[illegible]" is that the main and principal business of the average vessel docking at San Francisco is that of carrying passengers and cargo to and from other ports. While such vessels are harbored in San Francisco Bay they are here for the purpose of discharging such passengers or cargo as they carry, and the taking on of other passengers and cargo. The Yacht "[illegible]" contemplates an entirely different type of operation. A main and essential part of its business will be the conducting of a "club," a matter which comes within the definition of a public eating place, as defined in the Health Code.

You are therefore advised that all of the laws of the City and County of San Francisco and all the rules and regulations of the Department of Public Health would apply to the Yacht "[illegible]" while the business of a public eating place is conducted thereon.

Yours very truly,

[illegible] J. O'[illegible], City Attorney.

TO DIRECTOR OF PUBLIC HEALTH,
J. W. Geiger, M.D.,
Via [illegible] ADMINISTRATIVE OFFICER,
T. A. Brooks.

CHT:[illegible]

December 10, 1947

SUBJECT: AUTHORITY OF BOARD OF SUPERVISORS TO MAKE INDEPENDENT SALARY SURVEY.

Gentlemen:

I have your request for an opinion as follows:

"The Finance Committee is at the present time considering Proposal No. 7381 (Series of 1939), copy of which is attached herewith for your information, which contemplates authorizing the Finance Committee to undertake a salary standardization survey independent of that conducted by the Civil Service Commission."

"In connection with said Proposal, and pursuant to direction of Supervisor Mancuso, you are hereby respectfully requested to furnish your written opinion as to whether or not the Board of Supervisors or any of its committees may properly undertake such an independent survey, or whether the Board is restricted, in the matter of adopting salary standardization schedules, to the survey or surveys compiled and presented by the Civil Service Commission pursuant to provisions of the Charter."

OPINION

The fixing of the compensation of municipal employees is a municipal affair. The Board of Supervisors, as the legislative body of the City and County, has authority in this regard, subject only to the limitations of the Charter.

The limitations as to salary survey are contained in Section 151 of the Charter. They do not forbid the Board or any of its members to make such survey as either of them may desire. Nor do they forbid the reporting to the Board of any data so obtained or the consideration of it at the time of consideration of the schedules of compensation, summary of data and other information submitted to the Board by the Civil Service Commission. When any proposed amendment to such schedules is transmitted to the Civil Service Commission for review, analysis and report, the Board should also transmit to the Commission any of such data which it regards as warranting the amendment.

As to the appropriation and expenditure of funds for salary survey purposes, however, Section 151 contains a definite limitation. It is as follows:

"The board of supervisors shall appropriate twelve thousand five hundred dollars ($12,500) to the civil service commission to be known as the salary survey fund and to be used exclusively for defraying the cost of surveys of wages in private employment and in other governmental jurisdictions and making reports and recommendations thereon and publication thereof as herein provided. No expenditures shall be made therefrom except on authorization of board of supervisors.

In the event of the expenditure of any of said funds, the board of supervisors in the next succeeding annual budget shall appropriate a sum sufficient to reimburse said salary survey fund."

This limitation would be entirely meaningless if, in spite of it, the Board could appropriate to the Civil Service Commission a sum in excess of $12,500., as there provided, or could appropriate any sum at all to any other body or individual for salary survey purposes. The provision is a limitation on the Board of Supervisors as to both the amount and method of appropriation and expenditure of funds for salary survey purposes.

I therefore advise you that you can institute such independent salary survey as you desire, provided that you shall neither substitute it for the method set forth in Section 151 of the Charter nor appropriate or expend money of the City and County for such purpose.

Respectfully submitted,

CITY ATTORNEY

To: Board of Supervisors

WP

December 10, 1947

SUBJECT: Parking Meter Ordinance - Definition of the terms "Sundays or Holidays" as applied thereto.

Dear Sir:

I have your request for an opinion as follows:

"I would appreciate an opinion from your office as to whether or not the issuance of traffic citations for parking violations in an established "parking meter zone" are authorized on Saturday afternoons. The ordinance as now written does not specify Saturday afternoons as being any exception but does state that the parking restrictions do not apply on 'Sundays or Holidays.' Does the term 'Holiday' include Saturday afternoons in this case?"

O P I N I O N

On November 10, 1947, Section 3 of the Traffic Code was amended by adding thereto subdivision "c" defining the word holiday. Section 3 now reads:

"SEC. 3. SPECIFIC DEFINITIONS. Whenever in this Code the following terms are used, they shall have the meaning respectively ascribed to them in this section, unless otherwise apparent from the context:

* * * * * * *

"(c) 'Holidays.' Wherever the word 'holidays' appears, it shall include Saturday afternoons after 12 o'clock."

It is to be noted that the particular connotation set forth in subdivision "c" is applied whenever the word "holiday" is used in the Traffic Code.

When the Parking Meter Ordinance, as amended, was adopted together with the resolution passed pursuant thereto, fixing the hours of parking meter operations, and excepting Sundays and Holidays, it was not made a part of the Traffic Code.

You are therefore advised that the term "holiday" as used in the Parking Meter Ordinance does not include Saturday

afternoons and that the definition of the term as used in said ordinance may be found in Section 10 of the Political Code of the State of California.

Respectfully submitted,

JOHN J. O'TOOLE

City Attorney.

TO: THE HONORABLE MICHAEL M. RIORDAN,
Chief of Police of the City
and County of San Francisco
Hall of Justice
San Francisco.

CWD:MB

December 15, 1947

SUBJECT: Ruling on Purchase and Use Tax -
Whether Retroactively Applicable

Dear Sir:

I have your request for an opinion as follows:

"The Tax Collector informed inquirers and otherwise informally publicized a rule under which the Purchase and Use Tax would be made applicable to 20% of the sales of alcoholic beverages in San Francisco. The Purchase and Use Tax became effective October 1, 1947.

"Subsequently the Purchase and Use Tax Review Board asked the City Attorney for an opinion as to whether alcoholic beverages are taxable under the city ordinance. The City Attorney, under date of December 1, 1947, ruled that the San Francisco Purchase Tax is applicable to retail sales of alcoholic beverages.

"Will you please advise whether the ruling of the City Attorney can be made retroactive to October 1 or whether the Tax Collector may accept returns based on the applicability of taxes to 20% of the sales from October 1, to November 30, and upon 100% of sales from December 1 to December 31, 1947? The above refers to liquor sales.

"In regard to bottled goods the position of the City was that the local purchase tax did not apply. However, under the City Attorney's ruling, the tax does apply. Is the ruling of the City Attorney in this regard retroactive to October 1, or shall the tax be applied only for the third month of the current quarter?"

OPINION

At the time our purchase and use tax ordinance went into effect, an understandable situation existed which resulted in retailers of alcoholic liquor being generally informed that they were not expected to collect the tax on their sales of intoxicating liquor. On December 1st the City Attorney rendered his opinion that the tax did apply to the purchase and use of intoxicating liquor. The opinion was generally publicized at the time and distributed to representatives of the retail liquor industry and from then on the retailers were put on notice that the tax was applicable. As I understand it, the dealers are now protesting being held responsible for the tax on liquor sales prior to December 1st.

It is a general rule of law that an administrative official cannot bind the government by an erroneous interpretation of a

tax statute and it is likewise held generally that a governmental agency may not be estopped by the conduct of its officers and employees. In California, however, it has been decided that an estoppel may be asserted against the government in an exceptional case where justice and right require it. (Farrell vs Placer County, 145 Pac. 2d 570; City of L.A. vs County of L.A., 9 Cal. 2d 624; Times Mirror Co. vs Superior Court, 3 Cal. 2d 309; McGee vs. City of Los Angeles, 6 Cal 2nd 390; La Societe Francaise vs Cal. Emp. Comm. 56 C.A. 2d 534.)

The La Societe Francaise case involved a closely analagous situation in principle to the one herein considered. An administrative ruling was rendered that the Society was exempt from contributions under the State Unemployment Insurance Act on the theory that it was a charitable corporation. On the basis of such ruling the Society discontinued making deductions from the employees' salaries for remittance to the State. Later the ruling was reversed and a demand was made by the State Commission for a sum representing two years back contributions, which included amounts representing contributions that would normally have been deducted from the employees' salaries and paid to the State were it not for the erroneous administrative ruling. The Society paid under protest and then sued to recover the amounts paid. The Court held that it could not recover the amounts representing its own contributions but that it should have judgment for the amounts representing the employee contributions. The Court pointed out "It seems plain that if the State is permitted to retain the amount which represents the employees' contributions, plaintiff as the employer will be without recourse against its employees to recover from them the amounts which it should have withheld from their wages, but which it failed to withhold in reliance on official rulings that it was not liable for the tax. . . . As to such part of the tax, the burden of which the act contemplates will be borne by the employees, and which the employer "transmits" to the fund, we are of the view that the state may not belatedly hold the employer to payment where he has failed to pay, or to make the necessary deductions from his employees' wages, in reliance on an express ruling that he is not liable for the tax. As between the State and the employer, the state may not in good conscience thus place on the employer a burden which the act itself did not intend that he should bear . . . . "

Under our purchase and use tax ordinance the tax is imposed directly on the purchaser and the seller acts as the City's agent in its collection. Having been informed that they were not required to collect the tax, the liquor dealers did not do so and as a practical matter are now unable to effect collections for sales prior to December 1st. This presents a situation which seems to come directly within the purview of the rule announced in the La Societe Francaise case and I believe that an equitable estoppel could successfully be interposed against any attempt by the City to enforce payment by the liquor dealers out of their own funds of taxes they would have collected were it not for the ruling.

You are therefore advised that it is my opinion that the tax collector may accept returns from retail liquor dealers on bar sales based on 20% of the sales from October 1st to December 1st and upon 100% of sales from December 1st to December 31st and returns on bottled goods for the period December 1st to December 31st.

Respectfully submitted,

JOHN J. O'[illegible]

City Attorney

To: Chief Administrative Officer.

TJB

December 16, 1947

SUBJECT: USE OF NON-CONFORMING BUILDING,
CITY PLANNING COMMISSION, FOR
PROFESSIONAL PURPOSE.

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as follows:

"A building application has been filed with the City Planning Commission which requires an opinion from your office before the application can be acted upon.

Summary of the case:

A flat (a non-conforming two family structure) is to be altered in a first residential district to provide for a medical doctor's office on a portion of the first floor to be used and rented as a residence. The doctor intends to live in the flat on the second floor.

Points in question:

(1) Can a registered medical doctor alter a non-conforming flat in a first residential district so that his office will be on the first floor, together with a single family dwelling, while the doctor himself will live in the flat above having an outside separate entrance?

(2) Would a doctor's office be permitted under the above condition if, in addition, the second floor were connected to the office by an inside stairway?

The doctor and the people in the neighborhood are vitally interested in this matter and the City Planning Commission would appreciate your opinion on this case."

OPINION

The limitations on the changes permitted in the case of a non-conforming use, are set forth in Part II, Chapter III, Article 1, section 9, of the San Francisco Municipal Code, in part, as follows:

"Sec. 9. Non-conforming Building and Uses. Any non-conforming use (existing on the 24th day of September, 1931, may be continued) and any existing building designed, arranged, intended or devoted to a non-conforming use may be reconstructed or structurally altered and the non-conforming use therein changed subject to the following regulations:

(a) The cost of reconstruction or structural alteration of such a building shall in no case exceed fifty (50%) per cent of its assessed value, nor shall the building be enlarged unless the use thereof is changed to a conforming use;

(b) No non-conforming use shall be enlarged at the expense of a conforming use;".

Part II, Chapter II, Article I, section 3, of the San Francisco Municipal Code provides, in part, as follows:

"SEC. 3. In a first residential district no building or premises shall be used and no other building shall be constructed or altered which is arranged, intended or designed to be used for any purpose other than for:

(a) Single family dwelling; . . . . . .

. . . . . .

(f) The usual accessories located on the same lot with these various buildings not involving the conduct of a business, but including the office of a musician, physician or dentist or other person authorized by law to practice medicine when situated in the same dwelling used by such person as his or her place of residence; and a garage or group of garages containing space for passenger automobiles for the exclusive use of the tenants in the main building on the premises;".

The situation involved in the instant matter becomes relatively simple when we realize that when the improvements have been completed it will still only be a two-flat building as it was prior to the performance of the work. The reconstruction within the 50% limitation provided by law of a building without changing its character (as a two-flat building) is not the enlargement of a non-conforming use nor is it the enlargement of a building. It is simply the rearrangement of the non-conforming use so that the owner may better use and enjoy his property.

In my opinion to you dated November 14, 1944, on the same general subject matter, I pointed out that while the provisions of the San Francisco Municipal Code aforementioned do permit of the office of a physician to be conducted in one's residence, this permission is not without its limitations; that, though the office of a physician is permitted therein, it is only allowed where the use for professional purposes is but an incidental use to the main use, to-wit, that of acting as a dwelling or residence of the occupant.

It appears that in the instant situation that the use to be made of the building is incidental to its occupation as a dwelling. I can perceive no reason why a doctor in a case such as this may not rearrange the inside of a non-conforming use building, nor do I perceive any good reason why there cannot be an inside stairway constructed. In the final analysis, the building is still a non-conforming use and is still a two-flat building. It appears that in the instant matter the doctor intends to practice professionally as an incident to his residence in the building.

In connection with the foregoing, it must be borne in mind always that the only laws which restrict construction in specific areas are zoning laws and, unless the zoning laws actually restrict, any kind of a building may be constructed. Here, we have a situation where the law provides that no building shall be enlarged within a first residential district unless the use thereof is changed to conforming use. It is also provided that no non-conforming use shall be enlarged at the expense of a conforming use. Here, there is no enlargement of the building. This building is still approximately the same as to size upon the completion of the work. The non-conforming use will not be enlarged at the expense of the conforming use since the building is still a two-flat building and there is a direct exemption provided by ordinance which permits a doctor to practice in the dwelling where he resides. However, he would not be permitted to have a separate outside entrance, as this would enlarge the present use at the expense of a conforming use.

In view of these circumstances, it is my opinion that a doctor in a non-conforming use building such as this may have his office on the first floor, together with another single family dwelling, while he himself resides in the flat above, but he may not have a separate outside entrance. It is also my opinion that a doctor's office under these circumstances may be permitted if the second floor were connected to the office by an inside stairway.

Respectfully submitted,

JNO. J. O'TOOLE

City Attorney.

TO: CITY PLANNING COMMISSION
City Hall, San Francisco

[illegible]

December 16, 1947

SUBJECT: LEASE, TERMINATION OF, LAND'S END PROPERTY, BY PARK COMMISSION.

Gentlemen:

I have your request for an opinion as follows:

"Attached herewith is a copy of a Supplemental Agreement to Lease W868-eng-5229, between the United States of America and the City and County of San Francisco, which releases the portion of land consisting of 55.35 acres, more or less, of property commonly known as 'Land's End'.

"You will note on page 2, that in accordance with the terms of this supplemental agreement, the original lease would terminate on the 15th day of October, 1947, and the City would have to accept care and custody of said premises as of October 16, 1947 and the government being relieved thereafter from all responsibility therefore.

"The original of this enclosed document was presented to the Park Commission at its regular meeting of November 13 and in view of the accident which occurred on and about the premises in question on November 9, where a lady lost her life, the Commission has instructed that I forward this to you for your opinion and recommendation.

"As you know, the Commission does not execute these documents, but forwards them to the Mayor for signature with a recommendation of acceptance.

"In view of the above stated facts, will you please advise this office as soon as convenient, whether or not we should forward this document to His Honor the Mayor."

O P I N I O N

From a reading of the original lease executed in 1942 and the two supplemental agreements that are attached, it appears that on October 6, 1947, the date of the letter of transmittal covering the supplemental agreement to terminate the lease, the terms of the lease were as follows: the leasehold consisted of 55.35 acres, more or less, of the property popularly referred to as "Land's End" and was for a term of one year, with a waiver of notice of renewal each year and with the further provision that

either party could cancel the lease upon thirty days notice. It also recites that under no circumstances could the term of the lease extend more than six months beyond the date of the termination of the unlimited National Emergency as declared by the President of the United States in Proclamation No. 2487 dated May 21, 1941. Inasmuch as the unlimited National Emergency has not as yet been terminated, this provision is not applicable.

Considering the supplemental agreement attached to your request which covers the termination of the above lease and provides that in lieu of restoration of certain property a sum of money shall be paid, I find that the agreement contains a waiver of the thirty day notice and recites therein that all the preliminaries prior to the execution of this agreement and upon which this agreement is based have been completed. It is quite clear that this agreement is of no effect until executed by the parties to it and hence at this time has no binding effect upon either party.

Inasmuch as the recitals therein may not be carried out in accordance with the terms of the agreement, the time having already passed for their performance, I advise you to refer the matter back to the Corp of Engineers, San Francisco Real Estate Sub-Office, 74 New Montgomery Street, San Francisco 5, California with a letter of transmittal indicating that because of the delay in the receipt of the agreement the time for transfer of the premises must be changed.

Respectfully submitted,

CITY ATTORNEY

To: Park Commission
BJW

4047

December 19, 1947.

SUBJECT: Bids - Withdrawal on Account of Obvious Error on Bid.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"Under date of December 10, 1947, the Director of Public Works received and opened bids covering the improvement of Industrial Street between Bayshore Boulevard and Oakdale Avenue, where not already improved. The cost of this work is to be borne by the property owners fronting on the street improvement and is being performed under the 1934 Street Improvement Act, a copy of which I attach hereto.

"Proposals covering this improvement were submitted by Chas. L. Harney, Inc. and the Fay Improvement Company.

"The proposals for this improvement were submitted on a unit bid price and the proposal states, 'In case of a discrepancy between unit bid prices and the totals, the unit prices shall prevail'.

"The Fay Improvement Company on Item 20 of said proposal quoted a price of $4.25 each for 14 lighting standards complete. This unit price should have been $425.00 as evidenced in their totals covering this item. To further substantiate their claim, page 6 of said proposal lists the subcontractors who were to perform the work if the Fay Improvement Company were the successful bidder.

"You will note that the Fay Improvement Company lists George F. Brayer as his electrical contractor, and his price for Item 20 was $404.75 each. This is further substantiated by the subcontractor's written offer to the Fay Improvement Co. covering this work which accompanied the bid of the Fay Improvement Co.

"Inasmuch as unit prices prevail, the total covering Item 20 must be reduced from $5,950.00 to $59.50, and his total bid changed from $50, 906.60 to $45,016.10.

"As Section 15 of the 1934 Street Improvement Act provides 'Said Director shall immediately compare the bids with the records so made and shall thereupon or at such other time not exceeding 20 days thereafter, award the contract for the work to the lowest reliable and responsible bidder.' Would the Director of Public Works be within his rights and within the law to reject both bids and re-advertise this improvement at a later date? And at a later date should the bids received be in excess of the total bid submitted by the low bidder would the Director of Public Works and the Chief Administrative Officer be held on their bond for any differential between the two sets of bids as submitted?

"I particularly refer you to Sections 15, 16, 17, 19 and 26 of Part I, and Section 9 of Part II of the Street Improvement Act of 1934.

"I attach the bids submitted by Chas. L. Harney, Inc. and the Fay Improvement Company, and I would ask that the same be returned with your opinion which must be had on or prior to December 26, 1947, as the 1934 Street Improvement Act provides that the Contract must be awarded within 20 days after receipt of bids."

* * * * * * *

"Supplementing my letter of December 12, 1947, the following letter was received this date from the Fay Improvement Company:

"'We are calling to your attention a clerical mistake made in submitting our bid for the improvement of Industrial Street between Bayshore Boulevard and Oakdale Avenue on Wednesday, December 10, 1947.

"'Item #20 should have been $425.00 each instead of $4.25 for the light standards. On the Bid Sheet the total for the 14 standards is written in at $5950.00 and on the sheet recording bids from the subcontractors, George F. Brayer's listed at $404.75 per standard, also his original bid is written with the same figure and is on file with you.

"'In view of the above facts, we feel it is evident to any fair-minded person that this is one of those mistakes that one should not be held to account for, at a loss of $5890.50, therefore, we respectfully request our bid to be withdrawn.

"'We hope that it may be possible to re-advertise for new bids in the near future'.

"'Thanking you, we remain'

"May I request an opinion covering the following:

"1. Am I within my legal rights in permitting the Fay Improvement Company to withdraw their bid?

"2. If the Fay Improvement Company is permitted to withdraw their bid, must I re-advertise for new bids in connection with this street project?

"3. In re-advertising for new bids, am I in any way subject to attack by the property owners who would be subject to assessment covering the cost of the work?"

OPINION

I shall answer your inquiries in the same order in which they were propounded:

1. Am I within my legal rights in permitting the Fay Improvement Company to withdraw their bid?

Under date of August 16, 1939, I rendered my opinion in a situation comparable to the instant case. You will find that the authorities were extensively quoted, and in the course of the opinion I made the following statement:

"It has been the opinion of this office, expressed from time to time, not only to your department but also the Public Utilities Department that where a bidder makes an honest mistake in tabulating his bid, and where that fact is shown to the official who has a right to accept the bid, and that official is of the opinion that an honest mistake has been made, and that there was no intention on the part of the bidder to deceive the city or to gain any advantage by submitting the bid, that the official who has the right to accept or reject the bid may permit the contractor who has made the mistake to withdraw his bid and receive the return of his bidding check."

You are therefore advised that in the instant case you may permit the Fay Improvement Company, who made an obvious mistake, to withdraw its bid and receive the return of its bidding check.

2. If the Fay Improvement Company is permitted to withdraw their bid, must I readvertise for new bids in connection with this street project?

There were two bids for the work outlined in your communication, one from the Fay Improvement Company in a total amount of $50,906.60 (which was the amount intended had the error not occurred) and which was reduced to $45,016.10 because of the error and a bid from Chas. L. Harney, Inc. in the amount of $54,333.50. Should you permit the Fay Improvement Company to withdraw its bid, the bid of Chas. L. Harney, Inc. in the amount of $54,333.50 will be the only valid bid. However, Section 15 of the San Francisco Street Improvement Ordinance of 1934 reads in part as follows:

> "Said Director may reject any and all bids and may reject the bid of any bidder who has been delinquent or unfaithful in any former contract with said City and County and must reject all bids other than the bid of the lowest reliable and responsible bidder; and, on accepting said lowest bid he shall thereupon return to the proper parties the checks corresponding to the bids so rejected. If all the bids are rejected said Director shall return all the checks to the proper parties and may again invite sealed proposals for the proposed work as in the first instance."

It will be noted that this section provides that the director may reject any and all bids without specifying the reason for the rejection.

In the case of STANLEY-TAYLOR CO. v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, 135 Cal. 486, the charter of the City and County of San Francisco provided that: "'When the supervisors believe that the public interest will be subserved they may reject any and all bids and cause notice for proposals to be re-advertised'". The supervisors rejected all bids "for the reason that public policy demands such action be taken". The lowest bidder attempted, in the proceeding mentioned above, to have his bid sustained and accordingly appealed to the Supreme Court. The Supreme Court made the following observation on page 498:

> "It is alleged that no grounds of public interest or public policy were stated by defendant, or that any could be truthfully stated, or that any existed; and that the real reason for rejection of plaintiff's proposal was, that plaintiff had not been authorized by the Allied Printing Trades Council to use its label.

"'Where the law intended a subordinate body to be the final arbiter of any question, vesting such body with discretion to determine the matter, and making its judgment absolute, the writ of mandate will not lie to divest or mold or otherwise interfere with such discretion. In this instance, as appears from the resolution adopted and set out in the petition, the board of supervisors exercised its discretion. It determined a fact it was empowered by the charter to determine. That its determination was erroneous or its reasons bad is immaterial. It had jurisdiction to decide the matter and having such jurisdiction, its judgment cannot be controlled by the courts. How the public interest was subserved by rejecting the bid of plaintiff does not appear. Plaintiff was the lowest bidder, and had complied fully with the requirements of the charter, but that the board believed public policy would be subserved appears from the petition, and, under the law, action upon such belief is an exercise of discretion. The legislature has committed the power of deciding to the defendant. "When the supervisors believe," is the language of the charter, "that public interest will be subserved," they may reject "any and all bids." Were the court to interfere, it might substitute its belief and its judgment for the belief and judgment of the board, a result that our system does not contemplate'".

You may therefore reject any and all bids should you feel that this would be the proper course to take under the circumstances, and should you do so, you must readvertise for new bids.

3. In readvertising for new bids, am I in any way subject to attack by the property owners who would be subject to assessment covering the cost of the work?

In view of the statements made above with respect to your legal right to permit the Fay Improvement Company to withdraw its bid and your legal right to readvertise for new bids should the bid of Chas. L. Harney, Inc. be rejected, it is my opinion that you would not be subject to attack by the property owners who would be subject to assessment covering the cost of the work. The action which you undertake is fully authorized by Section 15 of the San Francisco Street Improvement Ordinance of 1934 and the cases cited in my opinion of August 16, 1939 and those cited in the instant opinion.

Respectfully submitted,

Department of Public Works
CC - Chief Administrative Officer

CITY ATTORNEY

RJB

December 18, 1947

SUBJECT: Claim for tax exemption and Application for Cancellation of Taxes by Office of Alien Property on that Certain Parcel of Real Property at 2000 Jackson Street, San Francisco, California, formerly occupied by German Consulate

Gentlemen:

This office is in receipt of your request of November 26, 1947, for an opinion as follows:

> "Attached hereto please find communication from the Office of Alien Property, together with claim for Tax Exemption and Application for Cancellation of Taxes on certain real property and the improvements thereon, located in the City and County of San Francisco, and a copy of a legal opinion supporting said claim, as well as a letter from Attorney General to the Governor in connection with this matter.
>
> "This matter is referred to you for opinion, recommendation and a statement setting forth the procedure by which the request of the Office of Alien Property should be complied with.
>
> "It will be appreciated if, when it has served your purpose, the attached Claim and correspondence may be returned to this office."

OPINION

The claim of Valentine C. Hammack, Manager, San Francisco Office of Alien Property, for and on behalf of Tom C. Clark, Attorney General of the United States, for tax exemption and application for cancellation of taxes sets forth in substance as follows:

1. Taxes have been levied by the City and County of San Francisco upon that parcel of real property and the improvements located thereon commonly known as 2000 Jackson Street, in San Francisco, California, for a period from April 29, 1941 to date in a total sum, including penalties, of $23,019.30.

2. On April 29, 1941 title to the real property was conveyed to the German Government by deed recorded in Book 3752 at page 240 of Official Records in the office of the Recorder of the City and County of San Francisco.

3. On September 4, 1947 the Attorney General of the United States vested the property under the provisions of Trading with the Enemy Act, by Executive Order No. 9751, executed on September 4, 1947

and recorded in Book 4693 at page 16 of Official Records in the Office of the Recorder of the City and County of San Francisco.

The claim for exemption and cancellation of taxes is predicated upon the following:

1. Allegation 2 of the claim for exemption and cancellation as follows:

> "That said real property and the improvements thereon were used by said German government exclusively for governmental purposes, to wit:
>
> "As the residence and office of the German Consulate General, in the City and County of San Francisco, State of California."

2. Section 201 of the Revenue and Taxation Code of the State of California as follows:

> "All property in this state, not exempt under the laws of the United States or of this State, is subject to taxation under this Code."

3. That portion of Article XIX of the "Treaty between the United States and Germany of Friendship, commerce and consular rights," signed December 8, 1923, and proclaimed October 14, 1925 (44 Stat. 2132), as follows:

> " * * * * Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited."

It is a correct statement that unless the treaty provision has been suspended or abrogated, it has the status of a law of the United States. My conclusion, however, is that the provision of the treaty involved was abrogated or suspended by the outbreak of war between Germany and the United States and has not been in operation for the taxable period herein.

Outbreak of war between two countries does not necessarily suspend or abrogate treaties between the two countries. Clark vs. Allen, 91 L. Ed. 1285 (1947); Karnuth vs. U.S. 279 U.S. 231 73 L. Ed. 677 (1929); Society for the Propagation of the Gospel vs. New Haven 21 U.S. 464, 5 L. Ed. 662 (1823); Markham vs. Allen 156 Fed. (2d) 653 (1946); Techt vs. Hughes 229 N.Y. 222, 11 A.L.R. 186.

The Supreme Court of the United States has been called on only in the three first above cited cases to determine the effect of war upon treaties. Some of the tests for determination of the question whether a treaty provision has been abrogated or suspended have been set forth in these cases and have been summarized in the opinion of the Supreme Court in Clark vs. Allen, supra, as follows:

" * * * * *

" We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. Society for Propogation of Gospel v. New Haven, 8 Wheat (US) 464, 494, 495, 5 L ed 662, 669, 670. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. Karnath v. United States, 279 US 231, 73 L ed 677, 49 S Ct 274. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in Techt v. Hughes, 229 NY 222, 128 NE 185, 11 ALR 166, supra, and we believe it to be the correct one. * * * * *

"Cardozo, J., speaking for the court, stated the applicable principles as follows:

"'The question is not what states may do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. . . . . President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (Fong Yue Ting v. United States, 149 US 698, 37 L ed 905, 13 S Ct 1016). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly . . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, en bloc. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 NY pp 242, 243, 128 NE 192, 11 ALR 173."

In Karnuth vs United States, supra, the Supreme Court stated as follows:

" * * * * * we quote, as apposite, the words of a careful writer on the subject:

'Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace, - frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear, therefore, to be simplest to take them to be annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace.' Hall, International Law, 5th ed. pp. 389, 390.

" estlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condition of things, such as treaties of cession, boundary, and recognition of independence, as well as those having no conceivable connection with the causes of war or peace, and (3) treaties establishing arrangements to which third powers are parties, such as guaranties and postal and other unions. Westlake, International Law, part II, pp. 29-32. He then says:

'Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for them to define on what terms they intend to close their interlude of savage life, and to re-enter the domain of law.'

"Fauchille, Traite de Droit International Public, 1921, vol. 2, p. 55, says that:

'A state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory states. War, to them, is a cause of final extinction

and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty.'"

In addition, writers on international law have stated that the test of a particular case of whether a treaty, or provision of a treaty, has been suspended or abrogated by the outbreak of war is the intent of the parties, expressed or implied, or inferable. Harvard Draft Convention on the Law of Treaties, Article 35, 29 American Journal International Law (Supp.) 1183-1203; Hyde, International Law, Second Edition, 1945, Section 547-548; Borchard, The Effect of War on the Treaty of 1828 with Prussia (1932) 26 American Journal International Law 382.

The portion of Section XIX of the treaty here involved grants exemption from taxation as to lands and premises which are used exclusively for governmental purposes. It is an inevitable consequence of outbreak of war that the lands and premises of one power in the country of the other power will not thereafter be used for governmental purposes at least for the continuation of the war. It is both in accord with the language of the treaty provisions here and the intent of the parties that a state of peace shall be an indispensable condition for the continuance of the term of such a treaty provision, and that outbreak of war makes for a condition incompatible with the terms of the provision, and that by outbreak of war such provision shall thereafter be considered as either abrogated or suspended. If the provision has been abrogated by outbreak of war there can be no question of the later revival of enforceability. Whether this provision has been abrogated, or merely suspended, it is not necessary to decide in this opinion. Even if considered as only suspended, there is no reason why the provision should automatically revive in the absence of a resumption of normal consular and diplomatic relations with Germany.

The vesting of title to the property by the Attorney General of the United States has no bearing upon the question of exemption or non-exemption from taxes. Section 36(b) of the Trading with the Enemy Act, as amended, provides that for tax purposes vested property shall be treated as if vesting has not occurred.

You are therefore advised that the assessment of taxes upon the land and premises involved herein for the period from and after December 8, 1941 and up to the present time was a valid and legal assessment, and the claim for cancellation of taxes and for tax exemption should be denied.

Respectfully submitted,

City Attorney.

To: Board of Supervisors
(Attn: Mr. John F. McGrath)

TMO

4049

December [illegible], 1947

Subject: Claim for Refund of Personal Property Taxes on Tugboats Filed by Shipowners' & Merchants Towboat Co., Ltd.

Dear Sir:

This office is in receipt of your request of November 24, 1947 for an opinion, to which is annexed a claim for refund and memorandum in support.

REQUEST

"Attached hereto are claims of the Shipowners' & Merchants Towboat Co., Ltd. for refunds of personal property taxes in the amounts of $1,77[illegible].37 and $1,[illegible].29 for the respective fiscal years 1945-1946 and 1946-1947, on account of tugboats listed in the claims.

"May I please have your opinion as to whether or not such tugboats, which I understand are engaged in towing vessels in and out of docking facilities, are 'engaged in the transportation of freight and passengers' within the meaning of Section 4, Article XIII, of the California Constitution, and as to the legality of making the refunds requested in this case."

OPINION

Section 4, Article XIII, of the Constitution of the State of California provides as follows:

"All vessels of more than fifty (50) tons burden registered at any port in this state and engaged in the transportation of freight or passengers shall be exempt from taxation except for State purposes until and including the first day of January, 19[illegible]."

On April 30, 1941 I submitted an opinion to the Assessor relative to the power of the City and County of San Francisco to tax tugboats and barges which make their home port in this County. The opinion in part is as follows:

"..... The problem of whether tugboats are engaged in the transportation of freight or passengers, presents a more difficult question and requires more detailed consideration. It is a general rule that where a statute or a constitutional provision provides an exemption from taxation such provision is to be given its technical or literal construction; for the law does not favor such exemption. With this in mind and since the word transport means, technically, "to carry, etc." and also since the principal use or purpose of a tug-boat is not to carry passengers or freight but rather to tow and move other vessels, it would seem

that such boats are not included within the exemption provided in said article of the constitution.

"This conclusion is also indicated by the decision of the District Court of Appeal in the case of [illegible] v. [illegible] of Los Angeles, 50 Cal. App. (2nd) 307. In that case the question was presented whether or not a fishing boat or purse seiner of more than 50 tons burden came within the exemption provided in this section of the constitution and the Court states as follows:

> 'With these definitions in mind and reading the phrase as a whole, we cannot escape the conclusion that the phrase 'engaged in the transportation of freight or passengers' as found in said section means 'engaged in the transportation of property of persons for hire'. It is conceded that respondents' vessels were not so engaged and therefore they were not exempt from taxation by appellant.' ....."

* * * * * * *

"Tug-boats, which are used principally for towing and moving other vessels are not 'engaged in the transportation of freight or passengers' within the meaning of said article of the constitution and hence are taxable under Political Code Section 3644, regardless of their tonnage."

* * * * * * *

The memorandum in support of the claim herein sets forth that the tug boats upon which a refund of taxes is claimed "were at all times engaged in towing and assisting the movements of barges and cargo and passenger ships, all for compensation'. It appears, therefore, that the regular or principal use of the tug boats was not "transportation of freight and passengers" within the meaning of the exemption in Section 4, Article XIII of the Constitution. You are therefore advised that the assessment and collection of taxes upon the tug boats was valid, and that therefore the claim for refund should be denied.

Respectfully submitted,

City Attorney.

To: Controller

TWO

1055

December 30, 1947

SUBJECT: DESTRUCTION OF RECORDS

Gentlemen:

I have your request for authority to destroy certain records. It reads:

> "I am advised by the Registrar of Voters, Mr. Thomas A. Ashe, that the following records in the office of the Registrar are no longer of value and may be destroyed without harm to the office:
>
> "Duplicate Affidavits of Registration for the years 1926 to 1931, inclusive
>
> "Civilian Defense Personnel Record Cards for the War years up to and including 1944
>
> "It is requested that you authorize destruction of the foregoing records."

O P I N I O N

(a) Duplicate Affidavits of Registration For Years 1926-31

These affidavits of registration were by law "deemed canceled for all purposes" on April 1, 1932. (Cal. Stats. 1931, Ch. 1032, p. 2177 at p. 2178, amending former Pol. Code Section 1094) Canceled duplicates to the affidavits of registration are required to be preserved for a period of ten years, and thereafter they may be destroyed. (Elections Code, Sec. 330.5)

Accordingly, it is my opinion that these duplicate affidavits of registration for the years 1926 to 1931 may be destroyed and their destruction is authorized.

(b) Civilian Defense Personnel Record Cards For War Years Up to and Including 1944

Section 26202 of the Government Code (Cal. Stats. 1947, Ch. 424, at p. 1138) provides:

"The board (of supervisors) may authorize the destruction or disposition of any record, paper or document which is more than five years old and which was prepared or received pursuant to a county ordinance or in any manner other than pursuant to a state statute."

The San Francisco Civilian Defense Council was set up by Ordinance No. 1448 which was passed on November 24, 1941, and the personnel record cards in question were not prepared or received pursuant to a state statute.

In section 328 of Part I of the San Francisco Municipal Code the board of supervisors has declared that "Any department head as defined in Section 20 of the Charter is authorized to destroy useless papers of such department five (5) years after receipt thereof and after they have served their purpose and are no longer required . . . The City Attorney shall . . . instruct department heads on destruction of papers which may have legal significance."

I believe these personnel record cards as of this date have no particular legal significance. Therefore, such of these cards as are now five years old may be destroyed forthwith; the remainder may be destroyed after they have been held for five years.

Respectfully submitted,

CITY ATTORNEY

To: Department of Finance
and Records

GEB

PROPERTY
OF THE
CITY AND COUNTY
OF
SAN FRANCISCO
CITY ATTORNEY'S OFFICE